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In The

Supreme Court of the United States

October Term, 1988

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

v.

BLACKSTONE VALLEY ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

SHELDON WHITEHOUSE
Special Assistant Attorney General
Department of Attorney General
72 Pine Street
Providence, R.I. 02903
(401) 274-4400

Counsel of Record
Attorney for Petitioner
JAMES E. O'NEIL
Attorney General
State of Rhode Island and
Providence Plantations

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1) Where state consumers have been charged utility rates "subject to refund" under the Federal Power Act, and FERC determines that these are excessive and orders the refund of the unjust and unreasonable portion of the rates, is a state order directing the refund to utility stockholders preempted by this Court's decisions in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore* and *Nantahala Power & Light Co. v. Thornburgh*?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

OPINIONS BELOW

The opinion of the Supreme Court of the State of Rhode Island and Providence Plantations that petitioner seeks to have reviewed is reported at 543 A.2d 253 as *Blackstone Valley Electric Company v. Public Utilities Commission*, and is reprinted in the appendix hereto, App. 1-6, *infra*.

The opinion of the Rhode Island Public Utilities Commission from which the appeal was taken, and the Order of the Supreme Court denying reargument of its decision, have not been reported. They are reprinted in the appendix hereto at App. 10-39 and App. 7-9, *infra*. The Public Utilities Commission decisions regarding the

Purchased Power Cost Adjustment clause, which are described in the Statement of the Case, are reprinted in the appendix at App. 40-52, App. 53-60 and App. 61-66.

JURISDICTION

Jurisdiction is asserted under 28 U.S.C. § 1257(3), for review by writ of certiorari of a decision of the Rhode Island Supreme Court. The decision to be reviewed was issued June 27, 1988, and became final on July 25, 1988 when the Rhode Island Supreme Court denied the petitioner Attorney General's petition for reargument.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Article VI.

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

STATEMENT OF THE CASE

This case arises from separate regulatory proceedings of two affiliated electric utility companies. One proceeding involving the Purchased Power Cost Adjustment clause ("PPCA clause") of Blackstone Valley Electric Company ("BVE" or "the Company"), a state-regulated electric utility. The second, a proceeding of BVE's corporate affiliate and wholesale power supplier, Montaup

Electric Company ("Montaup"), was before the Federal Energy Regulatory Commission ("FERC"). The issue is the state regulators' implementation, through BVE's PPCA clause filings, of a FERC-mandated refund of Montaup overcharges. There is little dispute over the facts.

I. Background

A. *Blackstone Valley Electric's PPCA Clause.* Blackstone Valley Electric Company is an electric utility under the jurisdiction of the Rhode Island Public Utilities Commission ("PUC") providing utility service at retail within the State of Rhode Island. BVE is one of several retail affiliates of an interstate wholesale supplier, Montaup Electric Company ("Montaup"), which is regulated by the Federal Energy Regulatory Commission ("FERC").

The PPCA clause is Blackstone Valley Electric's mechanism for passing on to its customers its cost of the power it purchases from Montaup Electric, by assigning a per-kilowatt/hour charge to retail customers.[1] The formula at issue in this case was created and proposed to the PUC by BVE, and was accepted by the PUC on May 21, 1982. Blackstone Valley Electric soon determined that the pricing formula of its PPCA clause was defective[2], and

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[1] For descriptions of the operation of automatic adjustment clauses such as the fuel adjustment clause or the PPCA, see *FERC v. Mississippi*, 456 U.S. 742, 748 n. 10 (1982); *Anaheim, Riverside, et al. v. FERC*, 669 F.2d 799, 806 (D.C. Cir. 1981); *Boston Edison Company v. FERC*, 611 F.2d 8, 9 (1st Cir. 1979); *New Jersey Central Power v. FERC*, 589 F.2d 142, 143 n. 2 (3rd Cir. 1978).

[2] Although not essential to this case, the defect in the PPCA clause formula appeared to be its inability to incorporate changes in BVE's load factor (a ratio between average and total electric demand), which affect the Company's profits.

was causing miscalculations of its purchased power costs. The result of BVE's defective local tariff was net under-collections at the local level.

BVE initially appealed to the PUC for recovery through its regular rates of the PPCA clause losses. In Blackstone Valley Electric, Docket No. 1701 (1983), the PUC denied BVE's attempt to recover the PPCA under-collection, and added:

> [I]f the Company determines that its PPCA clause does not adequately compensate the Company for its purchased power costs, it should consider amendments to the provisions of its PPCA clause which would reconcile costs and revenues in a more precise manner. A separate PPCA docket would be the most appropriate context in which to address whatever issues or proposals the Company chose to bring to our attention in this regard.

Id. at pp. 70-71.

On July 16, 1986, the Blackstone Valley Electric Company finally filed with the Commission a proposal to revise its Purchased Power Cost Adjustment clause. The Company's filing included a proposed "transition adjustment" of approximately $2.4 million to recoup the under-collections experienced by BVE since 1981 as a result of its defective PPCA formula. The proposed PPCA clause was approved by the Commission on March 10, 1987, Order #12274, PUC Docket No. 1856, App. 40, but the "transition adjustment" was "rejected and denied" on July 1, 1987 (with the exception of $540,720 accepted by separate settlement). Order #12365, PUC Docket No. 1856, App. 31. BVE took no appeal from either Order, and the PPCA matter appeared to be settled.

B. *Montaup Electric's FERC Rate Case.* On September 4, 1981, Montaup Electric Company filed a rate increase request at the Federal Energy Regulatory Commission. The filing was accepted and, without any hearing, made effective "subject to refund"[3] as of November 5, 1981. *Montaup Electric Company,* Docket No. ER81-749-000, *"Order Accepting for Filing and Suspending Revised Rates, etc.,"* 17 FERC (CCH) ¶ 61,014, at 61,215 (1981). Montaup's retail affiliates promptly filed to pass along their proportionate shares of the rate increase.

The Rhode Island PUC objected violently to the proposed retail increase:

> "[T]he real loser is the BVE rate payer–who cannot pass along his costs to anyone else–in that he is denied a fair opportunity to be heard on the merits of a rate hike before being required to pay it."
>
> . . .
>
> While it is true that the . . . rates are subject to refund, the fact remains that in these very difficult times our Rhode Island ratepayers must pay out of their pockets today while in Washington the burden has shifted to intervenors such as our Attorney General to persuade the FERC to undo what it has

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[3] This practice was consistent with FERC policy, which is to implement utility rate increases as filed after the thirty-day notice period and a one day suspension unless preliminary review of the filing indicates the filed rates would be "substantially excessive". *West Texas Utilities Company,* 18 FERC (CCH) ¶61,189 (1982). Where filed rates would be "substantially excessive", the FERC can suspend the rates for a maximum of five months. Since rate cases are not resolved this quickly, rates are implemented in the interim "subject to refund" upon a final decision by FERC.

> already done. In short, the actions of the FERC appear to us to be uncaring and flagrantly unfair to consumers.

Report and Order #10697, PUC Docket No. 1637 (May 21, 1982), App. 57-58, 59. In a related Order that first addressed Montaup's FERC rate increase, the state PUC vented its frustration at the predicament in which the federal "subject to refund" implementation of Montaup's rates put Rhode Island customers.

> Before closing, we take this opportunity to express our great displeasure with the FERC's decision to suspend the Montaup M-7 filing for only one day. . . . While we have no authority under our federal system to undo the FERC's decision, we do not hesitate to criticize Montaup and the FERC for the procedural predicament in which their actions have placed BVE and its customers. . . . The Commission will continue to speak out about this unhappy situation at every opportunity.

Order #10573, PUC Docket No. 1618 (November 30, 1981) App. 64-65 (citations omitted).

Despite the PUC's objections, it accepted that it had no choice but to implement the increase.

> Under existing federal law as interpreted by the United States Supreme Court, decisions of the FERC cannot be second-guessed by this Commission. Therefore, we must honor the FERC's decision to allow Montaup's M-7 supplemental rates. Under the circumstances of this proceeding, then, the Commission finds Blackstone Valley Electric's proposed . . . PPCA factor . . . to be reasonable, supported by the evidence, and in compliance with the Company's tariff. The new factor should be effective . . . , subject to refund because the FERC has not yet issued a final decision on Montaup's M-7 supplemental rates.

Report and Order #10697, *supra*, App. 56.

Thus was BVE's full proportionate share of Montaup's FERC-mandated rate increase passed on to BVE's Rhode Island ratepayers, without change or reduction, by the RIPUC. Over the following years, BVE customers continued to pay a rate containing the full FERC increase, although the defective state PPCA clause was sometimes ineffective in collecting the rate.

The wheels of justice at FERC ground exceeding slow, but at last on March 13, 1987 the Federal Energy Regulatory Commission decided on a "just and reasonable" level of rates for Montaup's 1981 filing. Opinion No. 267, *Montaup Electric Company*, Docket Nos. ER81-749-003 and ER82-325-002 (Phase 1), reported at 38 FERC (CCH) ¶ 61,252. The FERC order prompted a refund obligation to BVE's Rhode Island customers of nearly five million dollars. The refund was credited to BVE by Montaup on August 14, 1987.

II. The Proceedings Below

BVE used its PPCA clause to implement the refund. Of the FERC-mandated refund totalling $4,789,441.04, BVE proposed to refund to its customers only $1,829,911.97. The difference ($2,959,529.07) was the PPCA clause undercollection discussed above in Section IA, which had been disallowed by the PUC as a rate case expense in Docket 1701, *supra*, and "rejected and denied" by the PUC as a "transition adjustment" in Order 12365, *supra*.[4] BVE proposed to keep the difference

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[4] The dollar figure had increased slightly because of interest and additional undercollections between the October 1986 "transition adjustment" filing and the implementation of a new and improved PPCA clause January 1, 1987.

for its sole stockholder, Eastern Utilities Associates, the parent company also of its federally regulated affiliate, Montaup Electric. The proposed refund offset of $2,959,529.07 was vigorously contested by the Attorney General before the PUC.

The PUC found itself in a quandary. On the one hand, it had already twice ruled that the PPCA undercollections were barred, and the offset of PPCA undercollections against the refund had therefore to be rejected in order "to be consistent with our earlier decisions." Report and Order #12514, PUC Docket No. 1856 (January 14, 1988), App. 18. On the other hand, the PUC felt that the past PPCA undercollections were "now available in the form of a wholesale purchase refund" to be paid to the parent stockholder. *Id.*, App. 20.

Unable to decide[5], the PUC came up with a compromise "escrow fund" that was agreed by all parties to be unsupported and improper. Appeals by both parties followed to the Rhode Island Supreme Court. The court properly rejected the escrow proposal but, relying on its own perception of fairness and equity, mandated the refund offset rather than remand the case to the regulators. *Blackstone Valley Electric Company v. Public Utilities Commission*, 543 A.2d 253, 255 (R.I. 1988).

The Attorney General argued before the Rhode Island court, as issue number one in his brief, that the

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[5] "[The refund offset] cannot be directly returned to either the Company or its ratepayers." Order #12514, PUC Docket No. 1856 (January 14, 1988), App. 22.

doctrine of federal preemption, accepted in *Narragansett Electric Company v. Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978), barred state interference with a FERC-mandated refund. The Attorney General argued that the *Narragansett* doctrine applied equally to federally mandated rates and federally mandated refunds. The Court did not accept, or even address, this argument in its decision.

On a petition for reargument, the Attorney General again raised federal preemption as an issue, referring the court to the expansive language of the recent decision of this Court in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore et al.*, 487 U.S. ___, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) ("*Mississippi*"). The Attorney General argued that the principles of federal preemption just confirmed in *Mississippi* applied to FERC-mandated refunds, as well as to FERC-mandated rates and FERC-mandated cost allocations. The Rhode Island court denied reargument on July 25, 1988, opining that the federal preemption contention "borders upon the frivolous." *Order Denying Reargument*, App. 7. The court held that FERC "merely ordered Montaup to refund excessive rates charged to its wholesale customers." *Id.* According to the Rhode Island court, FERC "simply did not make any determination beyond that of requiring Montaup to refund a sum of money to Blackstone and its other wholesale customers. The disposition of those refunds was left as it must be to the individual state regulatory agency." *Id.*, App. 8. With this order denying reargument, the state proceedings were final.

III. Summary

1. By federal definition, the portion of the FERC rate to be refunded was an unjust, unreasonable and illegal charge. Federal Power Act, 16 U.S.C. § 824d(a).

2. The full level of the federal "subject to refund" rate increase was passed along to state customers, over state objection, by virtue of federal supremacy.

3. The local utility's simultaneous PPCA miscalculations were caused at the state level by the formula crafted by the local utility for its state PPCA tariff.

4. The local PPCA caused net undercollections to the local retail utility.

5. These local undercollections would have occurred whether or not there was a FERC rate increase filed by the local utility's federally regulated affiliate.

6. But for the state's use of the FERC refund to pay the local utility company, the PPCA clause undercollections would have been "lost to the Company for all time." *Blackstone Valley Electric Co. v. P.U.C., supra,* 543 A.2d at 255.

This petition to the United States Court seeks review of the Rhode Island decision because it offends the Supremacy Clause for a state to appropriate the customer refund of an illegal federal rate to make up unrelated state-jurisdictional losses of the local utility.

REASONS FOR GRANTING THE WRIT

I. The decision below is in direct conflict with the fundamental principles of federal preemption, espoused by this Court in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore* and *Nantahala Power & Light Co. v. Thornburgh*, forbidding states to interfere with utility rate matters passed on by the Federal Energy Regulatory Commission.

The Rhode Island Supreme Court, in *Blackstone Valley Electric Co. v. PUC*, 543 A.2d 253 (R.I. 1988) and an unpublished order denying reargument, determined the disposition of a FERC-mandated customer refund. The court, relying on notions of "equity and good conscience," 543 A.2d at 255, found that it would be "unfair and inequitable", id., to allow the customers the refund since the local utility had not recovered its full allowed rate during the refund period.[6] These notions prevailed over questions of federal supremacy.

The Rhode Island court evaded the impact of this Court's recent decision in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore et al.*, 487 U.S. ___, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) (*"Mississippi"*) by treating that decision as fact-bound. The Rhode Island court found

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[6] These notions are not appealable to this Court. Nevertheless, petitioner wishes to record his deep disagreement with this interpretation of the equities. As argued in Section IV, *infra*, petitioner believes it to be unconscionable to allow local utilities and "end run" around their own local tariff responsibilities by diverting to them the consumer refund of illegal and excessive federal rates.

Mississippi to be of "no relevance" beyond the state prudence determination there at issue. *Order Denying Reargument*, pp 1, 2.

Actually, the *Mississippi* decision relied explicitly on a "[broad] foundation," 487 U.S. at ___, 108 S.Ct. at 2438, 101 L.Ed.2d at 337, of "fundamental principles concerning the preemptive impact of federal jurisdiction over wholesale rates on state regulation." 487 U.S. at ___, 108 S.Ct. at 2439, 101 L.Ed.2d at 338. This foundation had been developed in *Nantahala Power & Light Co. v. Thornburgh*, 476 U.S. 953 (1986) ("*Nantahala*"). The "fundamental principles" included the filed rate doctrine, the broad exclusive jurisdiction of FERC, and the preemptive bar on state interference with FERC-mandated rates. *Mississippi*, 487 U.S. at ___, 108 S.Ct. at 2439, 101 L.Ed.2d at 338.

The Rhode Island decision falls squarely within the principles described in *Mississippi* and *Nantahala*, except that it is refunds rather than rates or allocations, and credits rather than costs, that are at issue. The Rhode Island court effected a prohibited "'trapping'" of a refund ordered by FERC, *compare*, *Mississippi*, 487 U.S. at ___, 108 S.Ct. at 2439, 101 L.Ed.2d at 339, and impermissibly altered the FERC-ordered refund by substituting "its own determinations of what would be just and fair," *id.*, 487 U.S. at ___, 108 S.Ct. at 2438, 101 L.Ed.2d at 338.

To paraphrase *Mississippi*:

> "Once FERC sets [a refund], a State may not conclude in setting retail rates that the FERC-approved [refund is] unreasonable. A state must rather give effect to Congress' plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority."

Mississippi, supra, 487 U.S. at ___, 108 S.Ct. at 2440, 101 L.Ed.2d at 339, quoting *Nantahala, supra,* 476 U.S. at 966. There is no principled reason to apply the broad, fundamental preemption principles of *Nantahala* and *Mississippi* to FERC-mandated rates and FERC-mandated cost allocations, but not FERC-mandated refunds.

What the Rhode Island court has done in its decision is to usurp a federally-mandated refund, thereby imposing an "unlawful" federal rate, in order to offset losses at the state level of an affiliated utility. The court "has consequently usurped a function that Congress has assigned to a federal regulatory body. This the Supremacy Clause will not permit." *Arkansas-Louisiana Gas Company v. Hall,* 453 U.S. 571, 581-582 (1981).

The writ should be granted to resolve the conflict between the principles of federal preemption in *Mississippi* and *Nantahala, supra,* and the decision of the Rhode Island Supreme Court below. *See, Chicago and Northwestern Transportation Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311 (1981) (misapplication of federal preemption doctrine by state supreme court constitutes grounds for granting certiorari).

II. The state court decision uses federal refunds in a manner repugnant to federal law, federal regulatory policies, and decisions of the United States Supreme Court.

The *Blackstone Valley Electric* decision violates the well-established "filed rate" doctrine, violates the consumer protection directives of federal utility regulation, and violates the well-established federal hostility to utility offsets against federal refund obligations. In general, of course, a state court of final appeal is free to disregard

federal precedents and policies so long as the Constitution is not offended. But in this case it is federal refund dollars that are used in the federally repugnant manner.

A. Violation of the Filed Rate Doctrine.

The filed rate doctrine was established by this Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Company*, 341 U.S. 246, 251-252 (1951), explained at length in *Arkansas Louisiana Gas Co. v. Hall, supra*, 453 U.S. at 578-584, and reiterated as one of the "fundamental principles" of this Court's recent *Mississippi* decision, *supra*, 487 U.S. at ___, 108 S.Ct. at 2439, 101 L.Ed.2d at 338.

The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall, supra*, 453 U.S. at 577. The Rhode Island decision departs from the filed rate doctrine by supplementing with federal refund dollars the rates collected under the local utility's filed tariff, relying on notions of "equity and good conscience." *Blackstone Valley Electric Co. v. PUC, supra*, 543 A.2d at 255.

B. Violation of Consumer Protection Directives.

This Court held in *Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591 (1943), that the Natural Gas Act,[7] 15 U.S.C. § 717 (1970) has the "primary aim . . . to

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[7] In this and other cases cited herein, the statute in question is the Natural Gas Act, rather than the Federal Power Act, 16 U.S.C. § 824d (1935), but "the relevant provisions of the two

(Continued on following page)

protect consumers against exploitation." 320 U.S. at 610, 612. In *Atlantic Refining Company v. Public Service Commission of New York*, 360 U.S. 378 (1959) the Court read the "just and reasonable" language of the Act (the "heart" of the Act, 360 U.S. at 388) as framed "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." 360 U.S. at 378. "The overriding intent of the Congress", the Court concluded, "was to give full protective coverage to the consumer as to price." 360 U.S. at 389. In short, the Federal Power Act is a consumer protection statute.

The Rhode Island court believes these consumer protection responsibilities extend no farther than to the FERC-regulated utility's corporate affiliates. *Order Denying Reargument* ("merely [to] excessive rates charged to [Montaup's] wholesale customers," App. 7). To the contrary, this Court has recognized that federal regulatory power extends to the "retail consumers" who pay the FERC-mandated wholesale rates.[8] *Mississippi, supra*, 487 U.S. at ___, 108 S.Ct. at 2439, 101 L.Ed.2d at 338. Even

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statutes 'are in all material respects substantially identical.'" *Arkansas Louisiana Gas Co. v. Hall, supra*, 453 U.S. at 577 n.7 (1981); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 350, 353 (1956).

[8] The 1935 Public Utility Holding Company Act had to be created to protect consumers from the "evils result[ing] from a lack of arm's-length bargaining" by affiliated utilities, 15 U.S.C. § 79(a); utility corporate affiliates hardly need protection from each other.

"intrastate activities of [electric] utilities, although regulated by the [local c]ommission, bring them within reach of Congress' power over interstate commerce." *FERC v. Mississippi*, 456 U.S. 742, 757 (1982) (citations omitted).

The Rhode Island decision also posits that, as between the refund of "unjust and unreasonable" consumer overcharges and the risk of undercollections by utilities under their filed rates, it is the utility that takes precedence over the consumer. The decision used dollars collected under this federal consumer protection statute to pay a local utility's losses that otherwise "would probably have been lost to the company for all time."[9] *Blackstone Valley Electric Co. v. PUC, supra*, 543 A.2d at 255. To

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[9] Collection of these particular losses is contrary to overwhelming federal precedent, as well as to federal consumer protection policy. *See, Boston Edison Co. v. FERC*, 611 F.2d 8 (1st Cir. 1979) and *Public Service Co. of New Hampshire v. FERC*, 600 F.2d 944, 956-61 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 990 (1979); (past fuel clause losses not collectable under retroactive ratemaking, filed rate doctrines). *See also: Southern California Edison Co. v. FERC*, 805 F.2d 1068 (1986); *Maine Public Service Co. v. FERC*, 622 F.2d 23 (1st Cir. 1980); *New Jersey Central Power v. FERC*, 589 F.2d 142 (1978); and *Virginia Electric and Power Company v. FERC*, 580 F.2d 710 (1978). Agency decisions include: *Boston Edison Company*, 6 FERC (CCH) ¶ 61,015 (1979); *Boston Edison Company*, 6 FERC (CCH) ¶ 63,004 (1977); *Jersey Central Power & Light*, 1 FERC (CCH) ¶ 61,283 (1977); *Maine Public Service Company*, 9 FERC (CCH) ¶ 61,009 (1979); *Pennsylvania Electric Company*, 1 FERC (CCH) ¶ 61,259 (1977); *Public Service Company of New Hampshire*, 1 FERC (CCH) ¶ 63,039 (1977).

(Continued on following page)

permit the state decision to stand would be "to let the administration of this law be governed not by the aim of the legislation to safeguard [consumers] but by a hostile philosophy." *Wilkerson v. McCarthy*, 336 U.S. 53, 69 (1949) (J. Douglas, concurring).

C. Violation of Federal Rejection Of Refund Offsets.

There is broad federal hostility to attempts by utilities to set off against their refund obligations other expenses or losses. The earliest expression of this sentiment occurs in *Natural Gas Pipeline Co. v. Federal Power Commission*, 134 F.2d 263 (7th Cir. 1942):

> [W]e express our conclusion, and our holding, which is *all refunds which petitioners must make, belong to the consumers*, for whose benefit these proceedings were instituted. The utilities with whom petitioners contracted, were merely conduits, by which natural gas

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(Continued from previous page)

These decisions apply this Court's explicit assignment to the utility of the risk of undercollections or illegal collections under filed rates:

> The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the [Federal Power] act, shoulder the hazards incident to its action including not only refund of any illegal gain but also its losses where its filed rate is found to be inadequate.

F.P.C. v. Tennessee Gas Transmission Company, 371 U.S. 145, 153 (1962).

> transported by petitioners was delivered to customers by utilities. The refunds do not belong and should not go to the utilities.
>
> . . .
>
> The proceedings which were instituted by Federal Power Commission and furthered by the Illinois Commerce Commission to reduce the natural gas cost to the utilities were for the benefit of the consumers.

134 F.2d at 265. The court adverted to "the trustee status of a public utility" with respect to a refund. *Id.*

The Supreme Court has rejected refund offsets in *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 825-828 (1968) (offset of "improvident" low prices against "unjust and unreasonable prices" rejected) and *Federal Power Commission v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 153 (1962) ("the company's losses in the first instance do not justify its illegal gain in the latter").

Court of Appeals decisions rejecting offsets include: *Interstate Natural Gas Association of America v. FERC*, 756 F.2d 166 (D.C.Cir. 1985) (rejecting offsets of amounts owed producers by pipelines against producer refunds); *Belco Petroleum Corp. v. FERC*, 589 F.2d 680 (D.C.Cir. 1978) (offset of losses during suspension period against refund rejected); *United Gas Pipeline Co. v. FERC*, 657 F.2d 790, 796 (5th Cir. 1981) (when a utility accepts money subject to refund "it becomes a stakeholder" and "the money belongs to the consumers"); and *Gillring Oil Co. v. FERC*, 566 F.2d 1323, 1326 (5th Cir. 1978) ("suggestion that consumers would not suffer from the refund offset defies plain arithmetic, ignores the ceiling rate concept, and [flouts] the filed rate doctrine").

These decisions amount to a clear expression of federal policy against offsetting consumer refunds with other utility obligations.[10] The Rhode Island decision uses federal refund dollars in direct violation of this policy.

In summary, the *Blackstone Valley Electric* decision uses federally mandated refund dollars in a manner that is multiply violative of federal law, federal precedents and federal policies. Congress "can preempt the states

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[10] A refund obligation would not exist if the FERC-approved rate was never passed along "subject to refund." However, such local regulatory activity has been rejected by the Supreme Judicial Court of Massachusetts in *Eastern Edison Company v. D.P.U., supra,* 446 N.E. 2d at 687, as violating federal preemption.

Narragansett Electric Company v. Burke, 119 R.I. 559, 568, 381 A.2d 1358, 1363 (1977), *cert. denied,* 435 U.S. 972 (1978), and *Natahala, supra,* 476 U.S. at 967-968, recognize that local cost decreases–"*other than* those resulting from the purchases of FERC-regulated power"–would reduce the impact of a simultaneous FERC-mandated wholesale increase. *Id.* This of course would not affect a refund.

Refund obligations might be forgiven in severe financial emergencies, where the refund would "adversely affect the public interest–as where it might impair [the utility's] financial ability . . . to continue its service . . . ," *Federal Power Commission v. Sierra Pacific Power Co., supra,* 350 U.S. at 355, or where the refund would leave the wholesale utility insufficient funds to cover actual out-of-pocket operating expenses. *Dorchester Gas Producing Co. v. FERC,* 571 F.2d 823, 827 (5th Cir. 1978).

These peculiar situations do not affect the present case, as petitioner will be able to demonstrate at the briefing stage of this proceeding.

completely in the regulation of retail sales by electric and gas utilities." *FERC v. Mississippi, supra,* 456 U.S. at 759. Without questioning the state's authority to establish such regulatory principles as a matter of state law, petitioner contests the local regulators' authority to apply federally repugnant doctrines to federal refunds.

Federal preemption displaced state consumer protection activities below when the FERC-mandated rate increase was originally enforced. Statement of the Case, Section IB, *supra.* If the state can now displace federal consumer protection doctrines over the FERC-mandated refund, the FERC "subject to refund" procedures become a double-edged sword, with both edges cutting against the consumer.

The writ should be granted to defend the above important federal policies from state interference. *See, Morton v. Ruiz,* 415 U.S. 199, 201-202 (1974) (violation of long-standing federal policies constitutes grounds for certiorari).

III. The novel decision below must be reversed to prevent abuse and disruption of the federal public utility regulatory scheme.

A. The Decision Opens a Novel Regulatory Loophole.

The *Blackstone Valley Electric* decision opens a critical and unprecedented loophole in federal utility regulation. Heretofore, there was no authority permitting state regulators to interfere with federally mandated refunds.

The novel proposition of law advanced by the *Blackstone Valley Electric* case opens a new regulatory opportunity for utility holding companies. For the first time, utility holding companies will be encouraged to collect

past losses of their retail affiliates retroactively, out of FERC-mandated refund obligations of their wholesale affiliates. Utility holding companies cannot be expected to let such an opportunity pass unheeded. The *Blackstone Valley Electric* decision must be reviewed in order to quell the foreseeable utility industry response to this new regulatory opportunity the Rhode Island court has opened.

B. The Decision Will Disrupt Federal Utility Regulation.

The rate a utility can charge under the Federal Power Act subject to refund is practically unlimited. Unless the FERC can conclude its proceedings – including discovery, hearings, the administrative law judge decision and the full Commission's decision – within the maximum suspension period of five months, then whatever rate the utility filed is put into effect. The refund obligation plays an important role in controlling abuses of these filing regulations.

The United States Court of Appeals for the District of Columbia Circuit has credited the "reasonable concern that [utilities] not be enticed to seek rates far in excess of the just and reasonable level in order to create a fund against which retroactive rates could be offset." *Belco Petroleum v. FERC, supra,* 589 F.2d at 691. Judge MacKinnon expounded at some length on this administrative principle. The offsetting losses he addressed were those occurring during a suspension period, but the principle applies equally to those occurring at the state level:

> Owing to the likelihood that the Commission will order a refund if a proposed rate is in excess of the just and reasonable rate, a [utility] now stands to

> gain very little from filing a rate [it] believes to be outside the zone of reasonableness.
>
> . . .
>
> [A]ny current tendency to propose a somewhat higher rate is more a function of a strategically-based hope for a higher legitimate return than a rationally-based expectation of future *illegitimate* gain. If, however, a [utility] were permitted to offset the income denied [it] during the suspension period against [its] refund obligation, the [utility] would then have an incentive to file a rate in excess of what [it] knows is a just and reasonable rate because of a rationally-based expectation of future illegitimate gain. That is, if the Commission's investigation of the proposed rate lasts longer than the suspension period (a not uncommon occurrence), then the [utility] would be allowed to collect the unreasonable rate and divert some of it to [its] own use, knowing that [it] will be able to offset some of this excess against income denied [it] during the suspension period.
>
> Allowing an offset . . . , would tend to encourage unreasonably high filings with an eye toward generating a fund with which suspension period rates could, in effect, be increased, thereby diminishing or eliminating altogether the refund due consumers.
>
> . . .
>
> Congress has determined that the risk of harm to the public of paying excessive rates–absent the additional incentives to file such rates inherent in an offset procedure–justifies the use of a five month suspension period. This delicate balance would be disrupted if [utilities] were encouraged to file excessive rates, ...

Belco Petroleum v. FERC, supra, 589 F.2d at 690-691 n.13. Judge MacKinnon concluded that offsets against FERC refunds would be a "[significant] disruption to a balanced regulatory scheme." *Id.* Thus the *Blackstone Valley*

Electric decision disturbs the fabric of federal regulation itself.

The writ should be granted in order to protect the federal regulatory scheme from this kind of abuse and disruption. *See, American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) (important issues of first impression under a federal statute constitute grounds for certiorari); *United States v. Ruzicka*, 329 U.S. 287, 288 (1946), *Rothensies v. Electric Battery Co.*, 329 U.S. 296, 299 (1946) (interference with effective administration of law constitutes grounds for certiorari).

IV. It is unconscionable to charge utility consumers unjust, unreasonable and illegal rates under the preemptive supremacy of the Federal Power Act, and then allow state interference with the refund to consumers of the excessive portion of the rates.

Section 205 of the Federal Power Act declares "any . . . rate or charge that is not just and reasonable . . . to be unlawful." 16 U.S.C. § 824d(a) (1935). We thus start with the premise established that the refund mandated by FERC was of an excessive and illegal rate. As described above, the purpose of the Federal Power Act is consumer protection. Consequently, where excessive and illegal rates are applied to states by the power of federal supremacy, equity–as well as the precedent of this Court cited *supra*–requires federal supremacy power to guard the refund of illegal charges as it flows back to consumers.

It would be bitterly unfair to allow utilities to use federal preemption as a sword to exact excessive and illegal charges, and then deny consumers the protection

of federal preemption to shield the refund of those charges. This would in effect "impose" an illegal federal rate in order to provide a fund with which to offset state-jurisdictional utility losses. The writ should issue in order to prevent such an unconscionable abuse of federal preemption.

CONCLUSION

For the several reasons expressed above, this petition for certiorari should be granted.

Respectfully submitted,

SHELDON WHITEHOUSE
Special Assistant
Attorney General
72 Pine Street
Providence, R.I. 02903
(401) 274-4400
Counsel of Record

James E. O'Neil,
Attorney General of the
State of Rhode Island, and
Providence Plantations,
PETITIONER

DATED: October 20, 1988

APPENDIX

BLACKSTONE VALLEY ELECTRIC COMPANY

v.

PUBLIC UTILITIES COMMISSION and its members, and Edward F. Burke in his capacity as Public Utilities Administrator.

No. 88-20-M.P.

Supreme Court of Rhode Island.

June 27, 1988.

Review was sought of Public Utilities Commission order calculating and placing restrictions upon electric utility's refunds for cost of power received by utility from wholesale power supplier. The Superior Court, Providence County, Giannini, P.J., entered judgment and further review was sought. The Supreme Court, Weisberger, J., held that when refund was made pursuant to Federal Energy Regulatory Commission determination, utility was entitled to retain that portion of refund that represented sums which it paid from its own equity resources, together with interest thereon.

Ordered accordingly.

Peter J. McGinn and Peter V. Lacouture, Tillinghast, Collins & Graham, Providence, David Fazzone, Boston, Mass., for plaintiff.

James E. O'Neil, Atty. Gen., Sheldon Whitehouse, Asst. Atty. Gen., for defendants.

OPINION

WEISBERGER, Justice.

This case comes before us on statutory petitions for certiorari filed by Blackstone Valley Electric Company (the company) and the Attorney General pursuant to G.L. 1956 (1984 Reenactment) § 39-5-1, to review an order of the Public Utilities Commission (PUC) calculating and placing restrictions upon refunds for cost of power received by the company from Montaup Electric Company (Montaup) for a period extending from 1981 through 1986. This refund represented excess amounts paid by the company to Montaup as found by retrospective rate adjustments made by the Federal Energy Regulatory Commission (FERC). We sustain the PUC order in part and modify it in part. The facts of the case insofar as pertinent to these petitions are as follows.

From November 5, 1981, through December 31, 1986, Montaup provided electric power to the company at interim rates allowed by FERC, subject to retrospective review and refund. The company, for a number of reasons, including failure of timely filing, was not permitted to recover the entire amount of interim charges made by Montaup from its customers. As a consequence, when the total refund amount of $4,789,441.04 was received from Montaup, the company proposed that it be allowed to refund over a period of time to its ratepayers the excess amounts paid by them over the period and retain for its own unrestricted use the sum of $1,866,340.37 together with interest on the ground that this sum had never been charged to the ratepayers and had been furnished by the company from its own funds.

To summarize the company's proposal, it requested permission to return a total of $1,829,911.97 to ratepayers by direct payment to past customers or credit to existing customers. In substance this request was granted. The company further requested that the remainder of the refund consisting of $1,866,340.37 principal received from Montaup together with $1,093,188.70 interest thereon be retained by the company for its own use since the principal amount of this refund had never been paid by the company's customers and had been paid to Montaup from the company's equity resources. The PUC recognized that the ratepayers were not entitled to this portion of the refund but required that the proceeds of this refund, together with interest thereon, be placed in an escrow account whose use would be limited to purposes approved by the PUC as a "source of funds designed to recompense [the company] for expenses associated with such initiatives as a load management and conservation program and/or membership to the Electric Power Research Institute."

The Attorney General argued before the PUC and to us that the entire amount of the refund should have been given to the ratepayers on the ground that any other disposition of these funds would constitute retroactive ratemaking in violation of principles enunciated in prior decisions of this court, *Bristol County Water Co. v. Harsch*, 120 R.I. 223, 231, 386 A.2d 1103, 1108 (1978); *Narragansett Electric Co. v. Burke*, 119 R.I. 559, 569-70, 381 A.2d 1358, 1363-64 (1977), save for extraordinary circumstances such as those encountered in *Narragansett Electric Co. v. Burke*, 415 A.2d 177, 179-80 (R.I. 1980).

We consider this argument to be untenable in light of our opinion in *Roberts v. Narragansett Electric Co.*, 470 A.2d 215 (R.I. 1984), in which we set forth clearly and unequivocally that disposition of a refund for charges made to a Rhode Island utility company by its wholesale power supplier did not constitute ratemaking, either retroactive or otherwise. We stated that "[t]he specter of retroactive ratemaking must not be viewed as a talismanic inhibition against the application of principles based upon equity and common sense." *Id.* at 217. We believe that the identical principles are applicable in the case at bar.

For reasons that are not entirely clear to us, the Attorney General argues that *Roberts* is distinguishable from the case at bar. He suggests as a critical distinction that the PUC decided in the utility's favor in *Roberts* but did not do so in the case at bar because the PUC had three times rejected the company's efforts to effect the retroactive recovery of its Purchased Power Cost Adjustment (PPCA) provision in its tariff. We are of the opinion that this fact is not conclusive or even relevant to the disposition of the refund. Great deference is paid to decisions of the PUC in its ratemaking-regulatory capacity, *Narraganset Electric Co. v. Kennelly*, 88 R.I. 56, 85, 143 A.2d 709, 726 (1958), and we assume that principles of retroactive ratemaking deterred the PUC from rating adjustments that would have provided a retroactive recovery of the company's PPCA under-collections. Therefore, had FERC not required the instant refund, the company would never had recovered its under-collections. Said funds would probably have been lost to the company for all time.

However, as we attempted to point out in *Roberts* and again reiterate, when a refund is made pursuant to a FERC determination, the company is entitled to retain that portion of the refund that represents sums which it paid from its own equity resources, together with interest thereon, and must refund to its customers the excess sums collected from them toward payment of its wholesale power supplier. Any other disposition would be unfair and inequitable. No doctrine of retroactive ratemaking or the administrative version of res judicata should or may inhibit this result. The commission emphasized in its report and order the absence of an " 'Equitable Adjustment' " clause in the most recent tariff filed by the company. We do not find this deletion to be either compelling or conclusive. We believe that all tariffs should be interpreted in accordance with equity and good conscience regardless of the specific language in which they may be couched.

The PUC has recognized that the ratepayers are not entitled to the return of that portion of the refund to which they never contributed. However, the PUC has chosen to place restrictions upon that portion of the refund that it allowed to remain with the company. These restrictions cannot be allowed to stand. It is the function of the PUC to regulate a utility in order to determine that its rates are fair and reasonable. It is not the function of the PUC to manage the utility or to exercise the prerogatives of ownership. *New England Telephone and Telegraph Co. v. Public Utilities Commission*, 116 R.I. 356, 375, 358 A.2d 1, 13-14 (1976); *United Transit Co. v. Nunes*, 99 R.I. 501, 512-13, 209 A.2d 215, 222 (1965); *Narraganset Electric Co. v. Kennelly*, 88 R.I. at 86-87, 143 A.2d at 726. However

benign and well-intentioned the creation of this escrow fund may have been, we believe that the company was entitled to the return of its portion of the refund together with interest thereon to be used without restriction for its general corporate purposes.

For the reasons stated, the company's petition for certiorari is granted. The PUC's report and order is sustained in part and quashed in part. The Attorney General's petition for certiorari is denied and dismissed.[1] The papers in the case may be remanded to the PUC with our decision endorsed thereon.

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[1] The company has argued in its brief that the Attorney General is not properly before this court because his cross-petition for certiorari was not filed within the period set forth in G.L. 1956 (1984 Reenactment) § 39-5-1. In view of our disposition of the petition, we have considered the Attorney General's arguments on their merits as though his petition had been timely filed. Our having done so does not indicate in any way that we may not require strict observance of time limitations in the future.

Supreme Court
No. 88-020-M.P.

Blackstone Valley Electric Co. :
v. :
Public Utilities Commission :

ORDER

The Attorney General in a petition for reargument has emphasized the doctrine of federal preemption in suggesting that a refund which was ordered by the Federal Energy Commission (FERC) from Montaup Electric Company required that such refund be made to Blackstone's retail customers. This contention borders upon the frivolous, since the FERC merely ordered Montaup to refund excessive rates charged to its *wholesale* customers. There was nothing before the FERC which in any way dealt with the disposition of the refund by Blackstone, but only the question that a refund should be made to Blackstone by Montaup.

The Attorney General cites a very recent case *Mississippi Power & Light Co. v. Mississippi et rel Moore et al*, 56 U.S.L.W. 4751 (June 24, 1988) in support of his position. Unfortunately, this case has absolutely no relevance to the questions presented to this court in the instant case. In the Mississippi case FERC had ordered Mississippi Power & Light Co. to utilize 33 percent of the power output of a nuclear plant known as Grand Gulf and located in Mississippi. This plant had been constructed by Middle South Utilities, a multi-state power enterprise of which Mississippi Power & Light Company was a subsidiary. FERC had ordered Mississippi Power & Light

Company to pay a rate for the 33 percent of the Grand Gulf output which was significantly higher than rates which would have been charged for power from other sources. The only method that Mississippi Power & Light Company had to pay these rates was to pass them on to their customers. Otherwise the company would have become insolvent. The Mississippi regulatory agency recognized this necessity and authorized Mississippi Power & Light Company to pass on these additional rates to their customers. The Supreme Court of Mississippi, however, remanded the case to the Mississippi regulatory agency with directions to determine the prudence of the decision to have invested in Grand Gulf in the first place. It was this determination by the Mississippi Supreme Court which the Supreme Court of the United States held in an opinion by Justice Stevens to be in violation of the Federal Supremacy Clause, since Congress had given FERC plenary authority in this area and therefore the FERC decision could not be second-guessed by a state court or regulatory agency.

Rhode Island had recognized federal preemption far earlier in *Narragansett Electric Company v. Burke,* 119 R.I. 559, 381 A.2d 1358 (1977) cert. denied, 435 U.S. 972 (1978). Neither the so-called "Narragansett doctrine" nor the recent preemption decision by the United States Supreme Court in Mississippi Power & Light Co., *supra* has the slightest impact upon the determination which the Public Utilities Commission of Rhode Island made upon the disposition of the subject refund. The FERC simply did not make any determination beyond that of requiring Montaup to refund a sum of money to Blackstone and its other wholesale customers. The disposition of those

refunds was left as it must be to the individual state regulatory agency.

For these reasons as well as the reasons stated in our opinion, the petition for reargument is hereby denied.

Entered as an Order of this Court this 25th day of July 1988.

By Order,

/s/ Michael Rafferty
Clerk

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS PUBLIC UTILITIES COMMISSION

IN RE: CHANGE IN PURCHASED POWER COST ADJUSTMENT, BLACKSTONE VALLEY ELECTRIC COMPANY

DOCKET NO. 1856

REPORT AND ORDER FOR SEPTEMBER AND OCTOBER, 1987;

AND

NOVEMBER AND DECEMBER 1987 AND JANUARY AND FEBRUARY, 1988

PPCA FACTOR FOR SEPTEMBER AND OCTOBER, 1987

On August 24, 1987, the Blackstone Valley Electric Company ("BVE" or "Company") filed with the Rhode Island Public Utilities Commission ("Commission") a proposed interim decrease in its Purchased Power Cost Adjustment ("PPCA") factor to be applied in the billing months of September and October, 1987. The Company subsequently revised its filing with supplemental testimony and exhibits, filed on August 28, 1987. BVE's present PPCA factor is $0.02960 per kilowatthour ("kwh"), approved in Commission Order No. 12385 issued June 27 1987, for application during the billing months of July, August, September and October, 1987. The Company's filing would change the PPCA factor from $0.02960 per kwh to $0.02701 per kwh, a decrease of $0.00259 per kwh or $1.30 for a 500 kwh per month residential customer.

The Company's filing is required by the terms of its Purchased Power Adjustment Clause, a tariff which calls for review of the Company's purchased power costs.

The Commission held a public hearing at 2:00 p.m. on September 3, 1987 at 100 Orange Street, Providence, RI.

The following entered their appearances:

FOR BLACKSTONE VALLEY ELECTRIC	David Fazzone, Esq. Sullivan & Worcester
FOR THE DIVISION OF PUBLIC UTILITIES AND CARRIERS AND DEPARTMENT OF ATTORNEY GENERAL ("DIVISION")	Sheldon Whitehouse, Esq. Special Assistant Attorney General
FOR THE ENERGY COUNCIL OF RHODE ISLAND ("TEC-RI")	Andrew Newman, Esq. Rubin & Rudman
FOR THE COMMISSION	John Spirito, Jr., Esq.

Mr. Dennis St. Pierre, who is employed by the Eastern Utilities Association Service Corporation (EUA) as its Director of Rates, was the only witness who appeared before the Commission. Mr. St. Pierre testified that under the provisions of BVE's current PPCA clause, R.I.P.U.C. No. 745, which became effective January 1, 1987, the Company is required to file for an interim adjustment whenever anticipated purchased power costs vary during any period by more than ten percent above or below the purchased power revenues estimated to be collected during the period. He further stated that such an interim adjustment has become necessary in the current adjustment period (BVE Exh. No. 5, p. 2).

Mr. St. Pierre testified that several events have precipitated the necessity of the instant filing. The primary cause, he explained, is related to two billing adjustments received from BVE's wholesale supplier, the Montaup Electric Company (Montaup). He testified that the billing adjustments are related to wholesale power refunds resulting from the Federal Energy Regulatory Commission's (FERC) recent action in two cases pending before it. The refund amounts total $4,789,441.04, and according to the witness, cause anticipated PPCA costs to fall below anticipated PPCA revenues by more than ten percent (*Id.*, p. 3).

Mr. St. Pierre explained that the FERC's two recent decisions "effectively settled all of the issues that were initially reserved for decision in the M-7 Phase I proceeding and, which through settlement agreements carry forward those issues through all subsequent cases including the most recent M-11 case" (*Id.*).

Additionally, Mr. St. Pierre testified that Montaup has stopped billing the Company for the recovery of abandonment losses associated with Pilgrim No. 2 (*Id.*, pp. 3-5). He noted that the savings became effective August 1, 1987 (*Id.*). Further savings were reflected through two other wholesale rate revisions, effective on July 21, 1987, according to the witness (*Id.*).

The Company's witness related that reductions to BVE were manifested on its July power bill from Montaup on August 14, 1987. A total M-rate refund credit of $4,789,441.04 was indicated (*Id.*).

Mr. St. Pierre next described certain proposed format changes in the instant filing. He stated that the filing now

includes, an estimated non-fuel energy cost for the period which had formerly been included in Montaup's demand rate. He explained that the "cost of purchased power (non-fuel)" represents the sum of these two items (*Id.*, p. 6). Mr. St. Pierre also described the components of the $266,635.15 credit which is reflected for the PPCA period in issue. He testified that the above credit is the aggregate of the aforementioned refunds and credits amortized to allow for a gradual recovery. This total amount breaks down as follows:

A) $(228,739.00) – M-7, M-8 and M-9 refunds, offset by PPCA undercollections through 1986. (Order No. 12365).

The Company has proposed that this credit he applied over a sixteen month period (*Id.*, p.7).

B) ($109,986.09) – Credit for overrecovery of costs related to the Pilgrim II abandonment loss.

The Company had proposed that this credit be applied over a two month period (*Id.*)

C) $67,590.06 – Two months amotization of prior period PPCA clause underrecoveries.

The Commission granted the recovery of $540,720.40 over a sixteen month period for PPCA clause underrecoveries (Order No. 12365).

D) $4,499.88 – Remainder of prior period reconciling adjustment.

Mr. St. piere further explained that before the above period credits were calculated, the Company deducted $1,866,340.37 from the total refund amount of

$4,789,441.04. He stated that the $1,866,340.37 represents the Company's net underrecovery for the period November 5, 1981 through December 31, 1986, less the previously approved adjustment of $540,720.40, *supra*, (*Id.*, p. 9). He reasoned that this deduction is now proper in light of the M-7 through M-11 settlements (*Id.*,). The witness also maintained that because BVE's customers never paid the $1,866,340.37 in past PPCA undercollections, they should not now be entitled to associated refunds (*Id.*, p. 9-10). Moreover, he testified that such an adjustment would not constitute retroactive ratemaking (*Id.*)

Following the testimony elicited on September 3, 1987, the parties forwarded memoranda to the Commission relative to the legal propriety of BVE's proposals.

In its memorandum, the Division argues that the Company's proposal to recoup the $1,866,340.37 in past underrecoveries is exactly similar to prior attempts for the same dollars in the instant and previous dockets. The Division maintains that the Commission has denied this request through past orders and should do so here. The Division supports its position by arguing that the Company's most recent attempt to collect the above-mentioned undercollection amount should be rejected on three bases, *viz*: "one, that it is barred by the regulatory prohibition against retroactive ratemaking; two, that it violates the BVE tariffs applicable to the overcollection; and three, that it is improper for BVE to seek to use its affiliate's FERC refund dollars to make itself whole" (Division Memorandum, p.3).

TEC-RI stated in its memorandum that BVE's proposed interim PPCA factor must be disallowed and

revised so that its customers receive the full refund credit amount of $4,789,441.04. TEC-RI has characterized the Company's proposal to offset the refund credit by $1,866,340.37, and to prorate the interest portion of the refund credit as improper attempts at retroactive ratemaking. TEC-RI additionally maintains that the Commission has already ruled on the undercollection amount in question, previously referred to as the "transition adjustment" and has found the request to recover this amount violative to rules against retroactive ratemaking. (TEC-RI Memorandum, p.3) TEC-RI cites Commission Order No. 12365, previously issued in this docket, in support of its contention. (*infra*).

The Company differed with TEC-RI and the Division over the $1,866,340.37 underrecovery. In its memorandum, BVE asserts that its customers should receive from the FERC refund amount only that amount actually paid by customers in excess of the settled rates plus interest. This total amount was identified as $1,153,986.53 in principal and $675,925.44 in interest (BVE Exh. 6, Schedule H, revised). The aggregate $1,829,911.97 was proposed by the Company to be returned to customers over a 16-month period. BVE maintains that the 16-month period was chosen on the basis of precedent established by an order of the Commission in the instant docket, wherein the Commission allowed the Company to recover from customers $540,720.40 in past undercollections, without interest. The Company reasons that it is entitled to principal and interest in the amount of $2,959,529.07, as this figure represents the " . . . payment of power bills, with interest, in excess of the settled rates which EUA

shareholders were obligated to absorb over the relevant period" (BVE Memorandum, p. 4).

In support of this contention, BVE proffered two arguments. First, BVE asserts that under the current PPCA clause (RIPUC No. 745), customers are allowed to receive wholesale refunds only to the extent they have made payments for purchased power in excess of the settled rates, regardless of when such payments were made. Additionally, the Company argues that the Commission's disallowance of a "transition adjustment" does not preclude a refund to retail customers net of past underrecoveries. In conjunction with this latter argument, BVE states that the Commission's decision to allow the Company to recover $540,720.40, in a prior order in this docket, was predicated upon underrecoveries associated with the M-10 settlement for a past period, June, 1985 through February, 1986. Therefore, the Company now maintains that in light of the FERC settlements discussed herein, a similar recovery for Company undercollections, should be allowed.

After a careful examination of the record in this matter, the Commission has identified several issues which must be addressed. The first issue involves the so-called "transition adjustment" amount of $1,866,340.37. This amount, as explained herein, represents the Company's net PPCA underrecovery for the period November 5, 1981 through December 31, 1986, less the previously approved adjustment of $540,720.40.

The above-mentioned transition adjustment was addressed earlier in this docket by the Commission through Order No. 12365 (issued July 1, 1987). In Order

No. 12365, which is attached to the instant order as "Appendix A" and incorporated by reference, we rejected the Company's request for authority to recover a transition adjustment of $2,404,912 for PPCA clause underrecoveries between November, 1981 and October, 1986. Instead, we authorized BVE to recover $540,720.40 over a sixteen-month period for those PPCA clause underrecoveries realized by the Company between June, 1985 and February, 1986. The basis for this lesser recovery was reflected in Order No. 12365 through Division rationale that was later adopted by the Commission. A portion of that language reads as follows:

> "The Division reasoned that this limited recovery would not be unreasonable in light of the actual losses incurred by BVE during the one-year period immediately preceding the filing of the instant case. The Division's Assistant Chief Accountant, Mr. Stephen Scialabba, testified that because the Company's PPCA undercollections for the period July, 1985 through October, 1986 were $548,304, the Division could support a recovery of $540,720.40 over a shorter sixteen-month period". (Order No. 12365, pp. 2-3).

The Commission's rejection of the $2,404,912 transition adjustment was predicated upon a Commission finding that BVE's previous PPCA clause (RIPUC No. 709) was adjustable prospectively only, based upon the prior twelve month's historical data; and that there existed no reconciling characteristics. Consequently, our conclusion was that the proposed transition adjustment amount of $2,404,912 must be denied as violative of prohibitions against retroactive ratemaking.

As noted above, we qualified our decision in Order No. 12365 by allowing the Company to recover $540,720.40 in PPCA underrecoveries, realized by BVE prior to the M-10 settlement agreement of February, 1986. In allowing this amount, we held that its recovery was reasonable by being "relatively contemporaneous" to the filing (Order No. 12365, p. 4). We did not authorize recovery of the $540,720.40 solely by virtue of the M-10 settlement agreement of February, 1986 as maintained by the Company in the instant proceeding.

In the present PPCA refund matter, BVE asserts that the balance of the original transition adjustment, plus interest, should now be recoverable in light of recent settlement agreements. This notion must be rejected by the Commission if we are to be consistent with our earlier decisions in this docket (Order No. 12365, *supra*). We shall reiterate to the Company that the PPCA underrecoveries realized between November, 1981 and December 1, 1986 are unrecoverable due to legal mandates against retroactive ratemaking. As we stated in Order No. 12365, *supra*, the Company should have attempted to mitigate its PPCA underrecoveries by filing for relief in a separate PPCA docket soon after underrecoveries became manifested (Order No. 12365, p. 3).

An additional weakness in the Company's position that settlement agreements should trigger the recovery of past undercollections can be found in its present PPCA clause, which became effective in January, 1987. Upon review of the Company's newest PPCA clause (RIPUC No. 745), the Commission finds that, unlike its predecessor tariff, the clause is devoid of language that would provide for an "Equitable Adjustment" in the event the

refund amount exceeded ratepayer collections (RIPUC No. 709, p.2). Arguably, an "Equitable Adjustment" provision in the new tariff would lend support to the Company's present position. However, BVE deleted this language from the present PPCA clause. Further, the Company gave no explanation on the record for the change. Both PPCA tariffs are attached herwith as "Appendix B" and incorporated by reference.

More difficult to understand, is why the Company failed to address future wholesale power settlement agreements when it first sought transition adjustment relief from the Commission in July, 1986. BVE was clearly aware of prior rulings by FERC administrative law judges and that discussions of settlement of the case were at an advanced stage. Nonetheless, the possibility of settlement was never broached by the Company in support of a transition adjustment. The Commission was never requested to examine the reasonableness of a transition adjustment in the light of foreseeable and expected purchased power refunds. Because this refund contingency was ignored by BVE originally, we are unable to accord it the consideration now requested by the Company.

The issue of the transition adjustment was addressed by the Commission in an earlier decision (Order No. 12365, *supra*) and is now *res administrata*. The Company, if aggrieved by our decision, did not avail itself of the opportunity to appeal our decision to the Rhode Island Supreme Court. In response to a question by the Commission as to why the Company chose not to appeal, the Company's Director of Rates, Mr. Dennis St. Pierre, responded "I do not believe we appealed" (9/3/87, Tr. 34).

The Commission is aware of the unique situation presented in this docket. We have a circumstance wherein the Company has requested that purchase power costs never collected from ratepayers, now available in the form of a wholesale purchase refund, be returned to the Company's shareholders. Conversely, we have previously found that the Company is not entitled to make itself whole for the PPCA underrecoveries incurred between November, 1981 and May, 1985, for reasons stated herein.

After much deliberation over the record in this docket, we have reached what we perceive as an equitable solution. The total refund amount in issue is $4,789,441.04. Out of this amount, only $1,153,986.53 represents actual ratepayer overcollections during the period November 5, 1981 through December 31, 1986. If interest is calculated theron, through July 31, 1987, ratepayers realize an additional $675,925.44 for a total of $1,829,911.97 (BVE Exh. No. 6, Sch. H, p. 1 of 7) We find that this amount must be directly refunded to past BVE customers or credited to existing customers. Additionally, until such time as the above amount is refunded or credited, it shall accrue interest, at prime, beginning on August 1, 1987.

The remainder of the refund amount, identified as $1,866,340.37 and $1,093,188.70 in principal and interest, respectively, will be escrowed by the company, in an interst bearing account. This account will later be considered by the Commission as a source of funds designed to recompense BVE for expenses associated with such initiatives as a load management and conservation program and/or membership to the Electric Power Research Institute.

The above initiatives, recently addressed by the Commission in separate unrelated dockets, show promise in helping control future rates. However, these initiatives are not without cost. Six conservation and load management programs were filed by BVE with the Commission on October 27, 1987 (Docket No. 1890). These programs, designed to help provide a stable energy supply by reducing the need for capacity during the summer peak and to provide energy cost savings opportunities to all classes of customers, are expected to generate significant expenses. Ultimately it is the Commission and the Company's view that these expenses will lead to savings both to the Company and its customers. For this reason we find that the expenses will have to be met. The Commission approved these programs and awaits a complete accounting of expenses which will become available as the programs in the BVE service territory develop (Bench decision issued November 25, 1987). Moreover, because it was clear from the testimony taken in the docket, that the Company will be planning additional conservation and load mangement initiatives in the future, we must also consider the likelihood of supplementally incurred expenses.

Membership in the Electric Power Research Institute (EPRI) has similarly been supported by the Commission. EPRI is a non-profit organization devoted to research and development activities designed to benefit electric utilities and their ratepayers. EPRI was organized by most of the nation's electric utilities in the early 1970's with the full support of the National Association of Regulatory Utility Commissioners. It is funded principally through

an assessment based on the kilowatt hour sales of member utilities.

In BVE's last major rate case, Docket No. 1849, the Commission was highly critical of BVE's failure to maintain its membership in the Electric Power Reasearch Institute. Because of this failure, the Commission made no allowance for such funding in its rate award. The Commission, however, urged the Company to reconsider its position in the following words:

> "The future economic well-being of Rhode Island and of this nation and the efficiency of electric generation and end uses of electricity are inextricably interwined. The efforts of EPRI to promote efficient uses of electricity are central to this effort. It has the full support of this Commission. It deserves the full support of all electric utilities" (Order No. 12231 , p. 91).

The Company has reconsidered its position and by letter of November 30, 1987, notified the Commission of its decision to rejoin the Electric Power Research Institute. The sum for membership would increase from approximately $95,000 in the first year to approximately $289,000 annually by year three which would represent full funding. A copy of the Company's letter and accompanying dues calculation sheet have been attached as Appendix "C" and incorporated by reference.

In the instant docket, we have concluded that $2,959,529.07 exists which cannot be directly returned to either the Company or its ratepayers. However, we have determined that funding initiatives which, in the long-term, benefit both the Company and the ratepayers would represent the best utilization of the $2,959,529.07.

We find these benefits, manifested in promoting both rate stability and not having to construct new power facilities, available through the initiatives discussed above. Consequently, we shall place the entire sum of $2,959,529.07 in a segregated account as a source of financing for the above-mentioned initiatives in lieu of having to address future requests for additional rate relief. The Company is instructed to periodically present for review by the Division and approval by the Commission an itemization of expenses to be drawn upon this account. The utilization of the account, in the manner specified, will be an alternative to other forms of rate treatment and should be mutually beneficial to both the Company and its customers.

PPCA FACTOR FOR NOVEMBER AND DECEMBER, 1987; AND JANUARY AND FEBRUARY, 1988.

Subsequent to the Company's filings of August 24 and 28, 1987, discussed above, BVE filed its PPCA factor for the period November and December, 1987; and January and February, 1988. The October 20, 1987 filing proposed a PPCA factor of $.01691 per kwh for application in the billing months of November and December, 1987: and January and February, 1988. Again, BVE's present PPCA factor is $0.02960 per kwh, approved in Commission Order No. 12385, *supra*. The Company's filing would reduce the present PPCA factor by $.01269 per kwh or $6.35 for a 500 kwh per month residential customer (this savings would contain within it the proposed $1.30 savings as proposed for September and October, 1987, *supra*).

As mentioned earlier, the Company's filing is required by the terms of its Purchased Power Adjustment Clause, a tariff which calls for review of the Company's purchased power costs.

The Commission held a public hearing on this susbequent filing at 10:00 a.m. on October 28, 1987, at 100 Orange Street, Providence, RI.

The following entered their appearances:

FOR BLACKSTONE VALLEY ELECTRIC	David Fazzone, Esq. Sullivan & Worcester
FOR THE DIVISION OF PUBLIC UTILITIES AND CARRIERS	Stanley Grebstein, CPA Division Rate Analyst

BVE offered Mr. Donald Bishop, a rate analyst for the EUA Service Corporation, in support of its filing. Mr. Bishop testified that the proposed PPCA factor of $.01691 per kwh is attributed to several factors. He identified the primary attributing factors as: an adjustment by Montaup, in the present period, which reflects changes in the federal corporate income tax law; an anticipated overcollection of $992,805.40 in the present period; a credit for the termination of Pilgrim II loss amortization; and the M-7, M-8 and M-9 refund credit that was received by BVE from Montaup (10/28/87, Tr. 10-11). Mr. Bishop quantified the aggregate of factors as follows:

a)	Montaup rate adjustment for July and August billings due to reductions in the federal income tax rate, effective July 1, 1987	$(452,641.89)
b)	Pilgrim II loss amortization recovery	$(109,986.09)
c)	M-7, M-8 and M-9 refund credit	$(457,478.01)
d)	Amortization of the M-10 settlement under recovery	$ 135,180.12
		$(884,925.87)

Mr. Bishop represented that the above M-7, M-8 and M-9 refund credit amount of $457,478.01 reflects the Company's proposal to return to the ratepayers only that portion of the refund amount that was actually overpaid by BVE's customers. Mr. Bishop identified this amount as $1,829,911.97, which has been proposed by the Company to be returned to customers over a sixteen-month period (the total refund amount in issue is $4,789,441.04, *supra*).

Lastly, at the request of the Division, Mr. Bishop calculated a new PPCA factor which excised the amortization of the M-7, M-8 and M-9 credit amount of $457,478.01. The result was a PPCA factor of $.01806 per kwh (10/28/87, Tr. 26-27).

Because this Commission has determined that the Company is not directly entitled to the $1,866,340.37 transition adjustment proposed herein, we cannot sanction a PPCA factor which is grounded in a contrary conclusion. The record indicates that a PPCA factor of $.01806 per kwh results when the aforementioned transition adjustment is removed from the calculations for the November and December, 1987 and January and February, 1988 billing period. The Commission will approve this PPCA factor.

The Commission has also reached some findings related to interest. The first involves the Pilgrim II loss amortization. This amount, $109,986.09 for the period in issue, ought to be paid to the ratepayers with interest accrued thereon. We note that this money has been in the possession of BVE since before August 28, 1987 (10/28/87, Tr. 13) and should properly be accruing interest, at prime, for those who would ultimately benefit from its existence. The Commission is also mindful of the interest potential associated with Montaup's rate adjustment, effective July 1, 1987, for reductions in the federal income tax rate. The Commission hereby directs the Company to calculate the interest that will likely be generated

from these adjustments. The interest calculations based on the prime rate, will be taken into account during the next PPCA factor period.

Accordingly it is

(12514) ORDERED:

1) That the Blackstone Valley Electric Company's proposed Purchased Power Cost Adjustment factors of $0.02701 per kwh and $0.01691 per kwh for application in the billing months of September and October, 1987; and November and December, 1987 and January and February, 1988, respectively, are hereby denied and dismissed.

2) That the Company shall adopt a Purchased Power Cost Adjustment factor of $0.01806 per kwh for application in the billing months of November and December, 1987 and January and February, 1988.

3) That the Company is instructed to hold $1,866,340.37 of the refund amount and the corresponding $1,093,188.70 in interest, in escrow for future disposition by this Commission in accordance with the options discussed herein. A status report providing a complete accounting of funds deposited, dispersed and interest accrued shall be made to the Commission every six (6) months. All interest generated from this account shall remain in the account and shall be subject to the same restrictions as noted above.

4) That the Company is further directed to return to its ratepayers, either by direct refund or credit, $1,829,911.97 of the total refund amount of $4,789,441.04. Interest shall be accrued, at prime, for the period of time that these funds are held by the Company.

5) That the company shall accrue interest, at prime, for the benefit of the ratepayers, on those funds associated with Pilgrim II loss amortization.

6) That the Company shall calculate the interest, at prime, relative to Montaup's billing adjustment for federal income tax rate changes which became effective July 1, 1987. The above calculations are to be filed with the Company's PPCA factor filing for the next billing period.

EFFECTIVE OCTOBER 30, 1987, PURSUANT TO AN OCTOBER 30, 1987 OPEN MEETING DECISION, WRITTEN ORDER ISSUED JANUARY 14, 1988.

(SEAL) PUBLIC UTILITIES COMMISSION

/s/ Edward F. Burke
Edward F. Burke, Chairman

/s/ Frank L. Nunes
Frank L. Nunes, Commissioner

/s/ Lila M. Sapinsley
Lila M. Sapinsley, Commissioner

Attachments

"APPENDIX A"

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: CHANGE IN PURCHASE POWER COST ADJUSTMENT, BLACKSTONE VALLEY ELECTRIC COMPANY — DOCKET NO. 1856

REPORT AND ORDER

On July 16, 1986 Blackstone Valley Electric Company ("BVE" or "Company") filed an application with the Rhode Island Public Utilities Commission ("Commission") seeking to revise its Purchase Power Cost Adjustment Clause ("PPCA").

Following published notice, the Commission held public hearings at its offices at 100 Orange Street, Providence, Rhode Island on September 26, November 3, and December 11, 1986.

The Commission subsequently issued a Report and Order on March 10, 1987 which ordered the following:

"1) That the July 16, 1986 filing with the Rhode Island Public Utilities Commission by the Blackstone Valley Electric Company seeking to revise its purchase power cost adjustment clause is herby granted as qualified herein.

2) the initial PPCA factor shall be $.02898 to be effective beginning January 1, 1987.

3) That the Commission shall further examine the Company's proposed transition adjustment, and objections thereto, and render a subsequent decision on this issue as soon as practicable.

4) That as a result of the Commission's decision in this case, Docket Nos. 1847 and 1865 shall be declared moot and appropriate orders in those dockets shall be issued." (Order No. 12274)

The purpose of the instant order is to now address the issue of the Company's previously deferred transition adjustment (Ordered Paragraph No. 3, above). This Report and Order will not discuss the merits or conclusions of BVE's recently approved forward-looking and reconciling PPCA clause (for such discussion, please refer to Order No. 12274, issued March 10, 1987).

In the present case, BVE has proposed that it be allowed to collect PPCA clause underrecoveries totaling

$2,404,912. This amount, the Company explained, is derived from PPCA revenues and costs mismatches between November, 1981 and October 1986 (BVE's Exh. No.1). BVE has proposed that the underrecoveries be collected via a transition adjustment over an 18-month period (*Id.*)

During the course of the proceeding, the parties asserted antithetical positions on this issue. The Division of Public Utilities and Carriers ("Division") and the Energy Council of Rhode Island argued that the Company's transition adjustment runs afoul of the reglatory prohibition against retroactive ratemaking. BVE, on the other hand, maintained that the offsetting of PPCA clause underrecoveries against refunds paid by a wholesale supplier is not tantamount to retroactive ratemaking.

The Division's position did, however, contain an agreement not to object to the Company's recovery of $540,720.40 in underrecoveries incurred between June 1985 and February 1986.[1] The Division reasoned that this limited recovery would not be unreasonable in light of the actual losses incurred by BVE during the one-year period immediately preceding the filing of the instant case. The Division's Assistant Chief Accountant, Mr. Stephen Scialabba, testified that because the Company's PPCA undercollections for the period July 1985 through October 1986, were $548,304, the Division could support a recovery of $540,720.40 over a shorter sixteen-month period (Div. Exh. No.1, pp. 2-3).

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[1] This time frame represents the period between the effective and settlement dates of Montaup's M-10 wholesale rate.

In response, BVE contended that its PPCA clause tariff (RIPUC No. 709) was expected to effect complete cost recovery for excess fuel and purchased power. Furthermore, the Company argued that its PPCA clause contained no time constraints as to when the offsetting of overcollections and undercollections can occur.

After careful consideration and examination of the record in this case, the Commission finds the Company's request to recover undercollections in the amount of $2,404,912, which date back to 1981, violative of the law against retroactive ratemaking. *Narragansett Electric Co. v. Burke*, ___ R.I. ___, 404 A2d. 821 (1979); *New England Telephone and Telegraph Co. v. P.U.C.*, 116 R.I. 356, 358 A2d. 1 (1976); and *R.I. Consumers' Council v. Smith*, 111 R.I. 271, 302 A2d. 757 (1973). In reaching this decision, the Commission considered two factors. First, BVE's PPCA clause (RIPUC NO. 709) was adjustable prospectively only, predicated upon the prior twelve month's historical data. There existed no reconciling characteristics. In fact, this is why the Company has opted for a new reconciling PPCA clause, which has recently been approved in this Docket (Order No. 12274). The second factor considered by this Commission was the reasonableness of allowing recoveries for undercollections dating back to 1981. Clearly, BVE could have come in sooner for relief. Moreover, the Commission suggested to the Company in Docket No. 1701 (October, 1983) that PPCA clause undercollections could be addressed if BVE undertook a separate PPCA docket (Docket 1701, pp. 70-71). Notwithstanding almost repeated annual undercollections between 1981 and 1986, coupled with the Commission's directive in Docket 1701

regarding its existing PPCA clause, the Company waited until July 1986 before taking action.

The Commission is however mindful of the $540,720.40 PPCA underrecovery realized by BVE prior to the M-10 settlement agreement of February 1986. As to the amount, we find its recovery to be reasonable by being relatively contemporaneous to the instant filing. We also support the Division's suggestion that the recovery of this amount be spread over a sixteen-month period.

Accordingly it is hereby

(12365) ORDERED:

1) That the Blackstone Valley Electric Company's proposed transition adjustment of $2,404,912 to be recovered over an eighteen-month period for PPCA clause underrecoveries between November 1981 and October 1986 is hereby rejected and denied.

2) That instead, the Company will be allowed to recover $540,720.40 over a sixteen-month period for those PPCA clause underrecoveries realized by BVE between June 1985 and February 1986.

3) That recoveries associated with the preceding paragraph shall become recoverable on a per kilowatt hour basis beginning with the Company's next period PPCA factor.

EFFECTIVE JULY 1, 1987, PURSUANT TO OPEN MEETING DECISION, WRITTEN ORDER ISSUED JULY 1st 1987.

(SEAL) PUBLIC UTILITIES COMMISSION

/s/ Edward F. Burke
Edward F. Burke, Chairman

/s/ Frank L. Nunes
Frank L. Nunes, Commissioner

/s/ Lila M. Sapinsley
Lila M. Sapinsley, Commissioner

"APPENDIX B"

R.I.P.U.C. NO. 745
CANCELS NO. 709

BLACKSTONE VALLEY ELECTRIC COMPANY
PURCHASED POWER COST ADJUSTMENT CLAUSE

The following provisions will apply to reflect fluctuations in the cost of purchased power charged the Company by its wholesale suppliers of power. As used herein "purchased power costs" shall be those costs chargeable to Account 555 of the Uniform System of Accounts, excluding any fuel portion of this account which is recoverable through the Fuel Adjustment Charge.

The charges made by the Company under rates subject to this clause shall be adjusted by a Purchased Power Cost Adjustment Factor ("PPCA"), as and when approved by the Rhode Island Public Utility Commission ("Commission"), to reflect the estimated current purchased power costs. The PPCA applicable to any period shall be the amount, positive or negative, adjusted for the Rhode Island gross receipts tax, by which the estimated purchased power costs per kilowatthour for such period vary from the currently approved base amount.

The PPCA shall be determined by dividing the estimated aggregate purchased power costs for the period by the estimated total kilowatthour sales for the period. When applicable, such figures shall be adjusted by the addition or subtraction, as the case may be, of any differentials from the prior two periods, between actual purchased power costs incurred and attributable to consumption under rates subject to this clause and actual costs recovered under this clause. Unless otherwise ordered by the Commission, such adjustments shall include wholesale suppliers' refunds and adjustments pertaining to such costs and received during such periods. If actual costs and revenues are not available for any month, they shall be estimated, subject to further adjustment, for purposes of the foregoing calculations.

Unless otherwise ordered by the Commission, the PPCA shall be forecast for successive periods consisting of four months. However, in the event conditions are actually experienced or reasonably anticipated, that will cause the purchased power costs to vary during any period by more than ten percent (10%) above or below the purchased power revenues estimated to be collected under the clause during such period, the Company shall apply to the Commission for approval of an appropriate decrease or increase in the PPCA to be applicable during the remainder of such period.

Date Filed, July 16, 1986

Date Effective, December 31, 1986
Per Order 12274 of March 10, 1987
In Docket 1856

R.I.P.U.C. NO. 709
CANCELS NO. 650

BLACKSTONE VALLEY ELECTRIC COMPANY
PURCHASED POWER COST ADJUSTMENT CLAUSE

The prices contained in the applicable rates of the Company are subject to adjustment for changes in the wholesale cost of purchased power from wholesale suppliers, exclusive of any adjustment for cost of fuel applicable thereto.

1. The Purchased Power Cost Adjustment applicable to any change in the wholesale price of purchased power shall be an amount (computed to the nearest thousandth of a cent) equal to the ratio that the increase or decrease in the cost of purchased power bears to the sales by the Company, in the year immediately preceding the effective date of the change in the cost of such power.

    a. Upon any increase in the wholesale rate under which the Company purchases its power supply, the Company may increase the prices in the rates to which such increase may be applied by an amount not to exceed the Purchased Power Cost Adjustment as determined in Paragraph (1) above.

    b. Upon any decrease in the wholesale rate under which the Company purchases its power supply, the Company will decrease the prices in its applicable rates by an amount equal to the Purchased Power Cost Adjustment as determined in Paragraph (1) above.

c. Any increase or decrease in the prices in the Company's applicable rates shall be made in accordance with a notice, to be filed with the Public Utilities Commission, setting forth the amount of the increase or decrease to be made in each of the prices in the rates to which it is applicable, the prices which will thereafter be effective, and the date on which they will become effective with respect to bills for meter readings on and after said date, which date shall not be earlier than 30 days after the filing of the notice, or such other date as the Public Utilities Commission may authorize.

Date Filed, August 11, 1983

Date Effective, Sept. 10, 1983
For bills rendered on and after
Sept. 10, 1983 per Order 11019
of Sept. 7, 1983 in Docket 1721

R.I.P.U.C. NO. 709

2. If the Company receives any refunds from its wholesale suppliers representing an amount collected in excess of the amount which would have been collected under the rates subsequently approved by the Federal Energy Regulatory Commission, the Company will make an equitable adjustment with its customers on those rates affected by the Company's Purchased Power Cost Adjustments. The amount of such adjustment by the Company shall not be greater than any applicable excess amount collected by the Company from its customers. Any such adjustment shall be applied to customers' bills commencing

within a reasonable period of time after the date of refund unless otherwise extended by the Public Utilities Commission, and shall continue until the amount to be refunded has been consumed.

3. The operation of this Purchased Power Cost Adjustment clause is subject to all powers of suspension, investigation and other regulatory authority of the Public Utilities Commission.

Date Filed, August 11, 1983

Date Effective, Sept. 10, 1983
For bills rendered on and after
Sept. 10, 1983 per Order 11019
of Sept. 7, 1983 in Docket 1721

"APPENDIX C"

Blackstone Valley Electric Co.
P.O. Box 1111, Washington Highway, Lincoln, Rhode Island 02865 Telephone (401) 333-1400

November 30, 1987 DEC 7, 1987

Mr. Edward F. Burke
Chairman
Public Utilities Commission
Division of Public Utilities and Carriers
100 Orange Street
Providence, RI 02903

Dear Mr. Burke:

I am in receipt of a letter from the Electric Power Research Institute (EPRI) stating that Blackstone Valley Electric Company can become a full member in good standing. EPRI will allow Blackstone to phase in full

membership over three years. The cost for the first year is $95,256 with a third year, full membership, cost of $288,654 (plus any dues increase by that time).

Through your encouragement and to provide our customers with the full benefits of new technology and knowledge derived from EPRI's research, Blackstone is anxious to move forward with its membership application. I look forward to discussing with you Blackstone's accounting of this expense.

Thank you for your guidance and suggestions in this matter. I await hearing from you to arrange a meeting date at your convenience.

Sincerely,

/s/ Bill
William R. Bisson
President

Blackstone Valley Electric Co.
Washington Highway, Box 111
Lincoln, RI 02865

1988 MEMBER PAYMENT COMMITMENT

1986 Kilowatthour sales (in thousands of kWh)...1,172,504

1986 Electric Revenue (in thousands).....$103,155

Calculation of Member Payment

A. Research Support Based on Kilowatthour Sales ($0.000226/kWh Sales) $264,986

B. Research Support Based on Revenue ($0.000929/$ of Revenue).....$95,831

C. Total Research Support
(A plus B) $360,817

D. Amount for Local R&D
(assumed to be 20%)..... $72,163

E. Full Member Payment
(C minus D)..... $288,654

F. Member Payment to be remitted to EPRI in
1988 based on 33% ramping formula $95,256

BVEC-N2-A

Signature Date

William R. Bisson President

Name Title

Criteria for Member Payment

Member Payment is determined by application of the following criteria established by the Board of Directors of EPRI:

* The basis for payment by Member to EPRI for calendar year 1988 (Payment Basis) is fixed at $0.000226 multiplied by kilowatthour sales to ultimate customers during calendar year 1986 plus 0.000929 multiplied by gross revenues, in dollars, derived from sales to ultimate customers during calendar year 1986.

* Member is authorized to offset against and to deduct from its Payment Basis its estimated expenditures which will be made in calendar year 1988 for local and regional research and development projects (local R&D), provided, however, that any local R&D in excess of 20% of its Payment Basis may not be offset or deducted.

* Member's total Payment to EPRI for 1988 shall not exceed Member's 1987 Full Member Payment plus 3.5% of that amount, providing that a member payment was made in 1987; or 0.45% of Member's 1986 gross revenue derived from sales to ultimate customers.

Schedule
Member Payment should be remitted in quarterly installments. First payment is due and payable on or before January 31, 1988.

Please complete and return two copies of this commitment form by November 15, 1987. Mail to:

EPRI
C. L. Menefee, Treasurer
3412 Hillview Ave.
Palo Alto, CA 94303

For further information call:
C. L. Menefee, (415) 855-2596

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: CHANGE IN PURCHASE POWER
COST ADJUSTMENT, BLACKSTONE
VALLEY ELECTRIC COMPANY DOCKET NO. 1856

REPORT AND ORDER

On July 16, 1986 Blackstone Valley Electric Company ("BVE" or "Company") filed an application with the Rhode Island Public Utilities Commission ("Commission") seeking to revise its Purchase Power Cost Adjustment Clause ("PPCA"). Also attached with the application was a motion for waiver of the Commission's Rules of Practice and Procedure for effect on August 16, 1986.

Pursuant to Section 39-3-11, of the General Laws of Rhode Island, as amended, the Commission, by Order No. 12103 suspended the proposed PPCA revision for five months on August 13, 1986, and by Order No. 12233 further suspended the effective date thereof for an additional three months on January 13, 1987.

Following published notice, the Commission held public hearing at its offices at 100 Orange Street, Providence, RI on September 26, November 3 and December 11, 1986.

The following entries of appearance were entered:

FOR BLACKSTONE VALLEY ELECTRIC — David Fazzone, Esq.
Sullivan & Worcester

FOR THE DIVISION OF PUBLIC UTILITIES AND CARRIERS ("DIVISION") AND DEPARTMENT OF ATTORNEY GENERAL	Sheldon Whitehouse, Esq. Special Assistant Attorney General
FOR THE ENERGY COUNCIL OF RHODE ISLAND ("TEC-RI")	Andrew Newman, Esq.
FOR THE COMMISSION	John Spirito, Jr., Esq.

The Company offered one witness, Mr. Dennis St. Pierre, who is employed by the Eastern Utilities Association Service Corporation (EUA), where he is its Director of Rates. BVE is an affiliate of the EUA. The Division also offered one witness, Mr. Stephen Scialabba, the Division's Assistant Chief Accountant. TEC-RI offered no witnesses.

Mr. St. Pierre began his testimony by describing how the PPCA factor is calculated under the existing clause. He explained as follows:

> "Under the present clause, historic data for the most recent twelve months, kw billing demands and kwh sales, are used to develop the annualized PPCA factor. The $/kwh factor so calculated is then applied to future sales of electricity to produce PPCA revenues. For such a clause to produce a match of PPCA revenues with costs, Blackstone's sales of electricity and purchased power costs would have to be consistent with those experienced in the historic year on which the factor is based" (BVE's Exh. No. 1, p. 2).

Mr. St. Pierre further stated that absent such consistency, the current clause must inevitably produce mismatches, from month-to-month, between revenues and costs. He

noted that, due to these mismatches, BVE has experienced a net estimated underrecovery through October of 1986 of $2,404,912 (BVE's Exh. No. 2). In fact, the witness added, BVE has witnessed very substantial underrecoveries of purchased power costs over the last four and one-half years (BVE's Exh. No. 1).

Mr. St. Pierre next explained that the Company, in dealing with the underrecovery in the instant filing, is proposing that the net underrecovery under the present clause, through the date the proposed reconciling clause becomes effective, be recovered by the Company through a temporary adjustment over a transition period of eighteen months (*Id.*, p. 4). He stated that the eighteen month transition period was chosen to minimize customer impact (*Id.*). Additionally the witness maintained that a reconciling PPCA is necessary as a result of a . . . "recent change in Montaup's wholesale demand rate structure . . . " (*Id.*).

He explained that the Montaup Electric Company's (Montaup) base demand has been split into two components, a base demand charge and a purchase capacity adjustment charge (PCAC). The PCAC would thereby change annually while the base demand charge changes only with a general rate filing increase as allowed by the Federal Energy Regulatory Commission (FERC).

Mr. St. Pierre further testified that BVE's proposed PPCA clause is beneficial because it is both forward-looking and reconciling. This will result in purchased power recoveries tracking purchased power costs more closely than under the present PPCA clause. Should

actual purchased power costs differ from actual purchased power revenues, the reconciling feature will provide for both the timely refund of overcollections or recovery of undercollections, according to the witness (*Id.*, p. 5). It was also noted that the proposed clause is designed not unlike BVE's Fuel Adjustment Clause (FAC). For example, under the proposed clause the calculation of a revised PPCA factor would occur every four months rather than at times of wholesale rate changes and would be subject to the same 10 percent provision as the FAC (*Id.*, p. 7). Mr. St. Pierre stated that the Company has chosen a four month adjustment period for two reasons. First, by combining the PPCA, FAC and Oil Conservation Adjustment Clause (OCA) filings the Company will save on administrative expenses. Second, any change in wholesale demand charges will become part of the normal four month PPCA filing routine and will not require special treatment (*Id.*, p. 8).

In deriving the proposed initial PPCA factor of $0.03019 per kwh (based upon a November 1, 1986 effective date) BVE explained that its calculations can be compared to its reconciling FAC and OCA tariffs (*Id.*, p. 8). Mr. St. Pierre represented that the calculations consisted of expected kwh demand and kwh sales, the total estimated cost of purchased power to the Company and the present estimate of the net underrecovery through October, 1986. He also stated that the proposed PPCA factor had been adjusted for the gross receipts tax and that the Company's proposed 18 month transition adjustment had been factored in (*Id.*, p. 8-9).

Lastly, Mr. St. Pierre described how the Company derived the overrecoveries and underrecoveries associated with the operation of the current clause. He explained that for the period November, 1981 through October, 1986 the current clause resulted in annual underrecoveries in 1981, 1982, 1984 and 1985 of $1,149,457, $345,986, $504,545 and $967,110 respectively (*Id.*, p. 10). Mr. St. Pierre projected an overrecovery for 1986 (through October) of $361,655. In 1983, the overrecovery was $200,532. The net effect, according to Mr. St. Pierre, is an underrecovery from November 1981 through October 1986 of $2,404,912 (BVE Exh No. 2).

In response to BVE's proposed PPCA clause, Mr. Stephen Scialabba, the Division's Assistant Chief Accountant, testified that the Division generally supports the Company's proposed PPCA clause (Div. Exh. No. 1, p. 1). In fact, he stated, similar types of clauses are presently in use by other utilities. However, Mr. Scialabba voiced disapproval of BVE's proposed transition adjustment. Mr. Scialabba stated: "I believe the Company's proposed transition adjustment is an attempt to recover past losses and violates the regulatory principle against retroactive ratemaking" (*Id.*, p. 2). Moreover, Mr. Scialabba maintained that BVE should have come in sooner on this issue. He noted that the Commission instructed the Company to amend its PPCA clause in October of 1983 (Docket No. 1701). He added that "the Company bears the burden of regulatory process, and its failure to invoke the process to change the clause should be held against the Company, and not against present and future ratepayers" (*Id.*, p. 2).

Mr. Scialabba did explain that the Division would accept a transition adjustment amount of $540,720. That

amount, he stated, was established pursuant to a stipulation entered between the Rhode Island Attorney General's office and the Company in Docket 1792, which has been attached and incorporated into this docket (*Id.*). Docket 1792 involved a BVE refund plan resulting from excess revenues obtained from the PPCA B-7 factor. According to the stipulation filed with the Commission in Docket 1792, the Company agreed not to propose reducing the refund by the M-10 undercollection of $540,720 and in return the Rhode Island Attorney General agreed not to contest, in the instant case, a PPCA undercollection recovery of equal amount.

Mr. Scialabba testified that the Division has determined that the aforementioned limited recovery, over a much shorter time frame, is reasonable under the resulting circumstances of the current clause (*Id.*, pp. 2-3). He explained that Division support for this amount is predicated upon the Company's PPCA undercollections for the period July, 1985 through October, 1986 (*Id.*). During that period the Company experienced a $548,304 undercollection loss. The month of July, 1985 was selected to begin the calculation of a transition adjustment, he explained, because it allows a recovery for a period of one year prior to the Company's filing of the reconciling PPCA clause in July, 1986 (*Id.*). Mr. Scialabba asserted that this period is more reasonable than BVE's position, which opts for a recovery back to November of 1981 (*Id.*).

On amortization of the $540,720 transition adjustment, Mr. Scialabba recommended a 16-month period. He reasoned that this period of time is comparable to the July, 1985 - October, 1986 period, over which his check figure of $548,304 was calculated (*Id.*, p. 4). Furthermore,

he added, "it also would cover four complete periods of the proposed fully reconciling clause, and would not necessitate changing the factor in the middle of the period (*Id.*).

Finally, Mr. Scialabba testified that the effect of his recommended transition adjustment, based upon the Company's estimated kwh sales figure for November, 1986 - February, 1987, would be $.00035 per kwh or $.14 for a 400 kwh customer. The effect under the Company's proposed transition adjustment would be $.00138 per kwh or $.55 for a 400 kwh customer (*Id.*).

Subsequent to the testimony offered in the present proceeding, all parties filed either a brief or a memorandum of law.

In its brief, BVE argued that the offsetting of PPCA clause underrecoveries against refunds paid by a wholesale supplier is not tantamount to retroactive ratemaking. In citing *Roberts v. The Narragansett Electric Company*, 470 A.2d 215 (R.I. 1984), the Company maintained that the Rhode Island Supreme Court has previously held such offsetting practices valid and not consituting illegal retroactive ratemaking.

Additionally, BVE contended that its present PPCA clause tariff (RIPUC No. 709) was expected to effect complete cost recovery for excess fuel and purchased power. In support, the Company outlined previous Commission orders which, one, allowed the recovery of $4,419,973 in fuel and purchased power costs resulting from the transition to new fuel and purchased power clauses over a fifteen-month period and, two, suggested that the Company initiate a separate PPCA docket if it determined that

its PPCA clause did not adequately compensate the Company for its purchased power costs (Docket Nos. 1541 and 1701, respectively).

The Company's brief further questioned the likelihood of any periodic adjustment clause being capable of assessing each customer with the demand costs which he or she has caused the Company to incur. Instead, BVE maintained that the present clause is premised on the concept that it is acceptable for present and future customers to pay rates that would recover undercollections caused by a body of past customers. Again citing *Roberts, supra,* the Company repeated the Courts' words that "the spector of retroactive ratemaking must not be viewed as a talismanic inhibition against the application of principles based on equity and common sense" (470 A.2d 215,217).

In closing, the Company asserted that its existing PPCA clause contains no time constraints as to when the offsetting of overcollections and undercollections can occur. Moreover, BVE states that the Division's choice of the period July, 1985 through October, 1986 is arbitrary. Similarly, BVE finds the underrecoveries of approximately $540,720 during this period merely coincidence and not deserving of a finding of relevance.

The Division's Memorandum of Law reflected a much different position. The Division maintained that the Company's transition adjustment runs afoul of the regulatory prohibition against retroactive ratemaking. Furthermore, the Division believes that the proposed transition adjustment is just another attempt by BVE to recover past undercollections caused by the operation of its PPCA clause (Docket Nos. 1701 and 1729 were cited as

prior examples). In short, the Division represented that rates are designed to recover costs prospectively, not to guarantee cost recovery retroactively. The Division stated that discrepancies between actual costs and revenues are inherent in the prospective nature of ratemaking and cannot be remedied on hindsight.

Next, the Division distinguished the instant case from Docket No. 1541, which was raised by the Company in defense of its proposed transition adjustment. The difference, according to the Division, is that in Docket 1541 the Commission allowed BVE a transition adjustment to fill a gap created by BVE's switch from a lagging to a forward-looking adjustment factor. In the present case, the Division fails to recognize such a regulatory gap.

TEC-RI's brief submitted that BVE's proposed transition adjustment be rejected by the Commission for several reasons. These reasons included prohibitions against retroactive ratemaking, failure by BVE to present any evidence that past overrecoveries and underrecoveries were treated as deferred accounting entries that would justify their inclusion in a transition adjustment and because BVE's proposed tariffs do not authorize the proposed treatment of past overrecoveries and undercollections experienced under its present PPCA.

TEC-RI also recommended that if the Commission approves the proposed forward looking/reconciling PPCA, it should order an annual, rather than quarterly, reconciliation. TEC-RI also suggested that if the proposed tarriff is approved, the Commission should remind BVE that its entitlement to the recovery of purchased power

expenses may depend upon the prudence of the arrangements under which it obtains its power supply.

After careful consideration and an extensive examination of the record in this case, the Commission finds the Company's proposed forward-looking and reconciling purchased power cost adjustment clause reasonable and supported by evidence. We do, however, wish to modify the language of the tariff's third paragraph (R.I.P.U.C. No. 745). Specifically, the Commission finds that the third sentence in the aforementioned paragraph should read as follows:

> "Unless otherwise ordered by this Commission, such adjustments shall include wholesale suppliers' refunds and adjustments pertaining to such costs and received during such periods."

The Company is hereby instructed to effectuate the above modification.

On the issue of the Company's proposed transition adjustment, we wish additional time to examine its merits and possible ramifications. Moreover, briefs on this issue have just recently been filed by the parties, thereby requiring further Commission scrutiny. Consequently, we will reserve judgment on the transition adjustment issue for a future date in order to avoid unnecessary delays in the implementation of the Company's proposed PPCA clause.

As an additional issue, the Company filed two related applications in 1986. The two applications have been given separate docket status and are recorded as docket numbers 1847 and 1865.

Docket 1847, filed on July 1, 1986, proposed PPCA factor B-8S as a result of the settlement of Montaup's M-11 rate with the FERC. The proposed B-*8S factor reflected a decrease in the wholsale power cost and was to be effective until the implementation of a forward-looking PPCA clause.

Docket 1865, filed on December 1, 1986, was also made pursuant to BVE's PPCA clause (R.I.P.U.C. 709) and reflected the Company's intent to file for a change in the present PPCA factor.

In light of our decision to approve BVE's proposed forward-looking and reconciling PPCA clause in the instant docket, it is the present finding of this Commission that the Company's requests in Dockets 1847 and 1865 have been rendered moot and without substance. As a result, those matters will be dismissed and appropriate orders shall be entered in those dockets.

The Commission must now address the Company's porposed initial PPCA Factor. In BVE Exh. No. 2, the company proposed an initial PPCA factor of $.0319 for the four-month period starting November 1, 1986. This factor included a transition adjustment amount of $534,425. Nevertheless, due to the chronology of the instant matter, we have determined that it is more appropriate to use a two-month calculation for the initial factor. This initial two-month calculation shall be based upon estimated wholesale demand cost and sales for January and February, 1987. Consequently, in calculating the initial factor for this two-month period, excluding the effect of the proposed transition adjustment, the initial factor which results is $.02898 (a factor of $.03031 would result

with the inclusion of the proposed transition adjustment). It is this initial PPCA factor which is approved by this Commission. This factor is further approved for a January 1, 1987, effective date and for a two-month period or until amended by a subsequent order of this Commission.

Accordingly it is hereby

(12274) ORDERED:

1) That the July 16, 1986 filing with the Rhode Island Public Utilities Commission by the Blackstone Valley Electric Company seeking to revise its purchase power cost adjustment clause is hereby granted as qualified herein.

2) The initial PPCA factor shall be $.02898 to be effective beginning January 1, 1987.

3) That the Commission shall further examine the Company's proposed transition adjustment, and objections thereto, and render a subsequent decision on this issue as soon as practicable.

4) That as a result of the Commission's decision in this case, Docket Nos. 1847 and 1865 shall be declared moot and appropriate orders in those dockets shall be issued.

EFFECTIVE DECEMBER 31, 1986 PURSUANT TO OPEN MEETING DECISION. WRITTEN ORDER ISSUED MARCH 10, 1987.

PUBLIC UTILITIES COMMISSION

/s/ Edward F. Burke
Edward F. Burke, Chairman

/s/ Frank L. Nunes
Frank L. Nunes, Commissioner

/s/ Lila M. Sapinsley
Lila M. Sapinsley, Commissioner

Note: As a result of the general rate case, Docket #1849, it was agreed by all parties that the Company would roll into base rates the PPCA B-1 factor, which represents that portion of Montaup demand charges which have been settled at the FERC. Consequently, effective with the implementation of new rates on February 11, 1987, the cumulative PPCA factor of $.02898 per kwh has been reduced to $.02383 per kwh, while the amount in base rates has been raised from $.01463 per kwh to $.01978 per kwh.

(SEAL)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS PUBLIC UTILITIES COMMISSION

IN RE: PURCHASED POWER :
COST ADJUSTMENT NO. B-4 : DOCKET NO. 1637
FIELD BY BLACKSTONE :
VALLEY ELECTRIC COMPANY:
ON MARCH 15, 1982. :

REPORT AND ORDER

In accordance with blackstone Valley Electric Company tariff R.I.P.U.C. No. 582, the Purchased Power Cost adjustment (PPCA) factor is a per kilowatthour (kwh) charge reflecting the cost of electric power purchased by the Company from its affiliate and wholesale supplier, Montaup electric company, as approved by the Federal Energy Regulatory commission (FERC), exclusive of any adjustment for the cost of fuel. The currect effective cumulative PPCA factor is $.020405 per kwh following Commission approval of the PPCA No. B-3 rate of $.00427 per kwh in Order No. 10573 issued November 30, 1981, effective subject to refund for electricity consumed on and after that date.

On March 15, 1982, Blackstone Valley Electric filed its PPCA No. B-4 rate of $.00124 per kwh (as revised) to be added to the currently effective rates, increasing the cumulative PPCA factor to $.02529 per kwh. The increase in the monthly bil for a typical residential customer using 400 kwh would be $.49. The filing also contained a new PPCA tariff, R.I.P.U.C. #609, to change certain language in R.I.P.U.C. No. 582. The Company requested that PPCA No. B-4 and R.I.P.U.C. #609 take effect on April 20, 1982, the same proposed effective date as Montaup's filing with the FERC of its M-7 supplemental rate which was

the basis for Blackstone Valley Electric filing with us. On March 25 Blackstone Valley Electric filed a Motion for Relief Under §39-3-12 of the General Laws, requesting the Commission to allow PPCA No. B-4 to become effective without hearing, subject to refund, on April 20 or on such other date as the FERC allowed Montaup's M-7 supplemental rate to take effect. On April 19 the Commission issued Order No. 10676 suspending the effective date of the filing for a period of five months beyond April 20 and thereby denying the Company's Motion.

At 10:00 a.m. on May 14, 1982, the Commission held a noticed public hearing at which the following appearances of counsel were entered:

FOR THE COMPANY: Sullivan & Worcester
By: Robert V. Cauchon, Esquire

FOR THE DIVISION: Richard E. Crowell, Esquire

Blackstone Valley Electric presented its case through its witness Dennis St. Pierre, Executive Assistant with EUA Service Corporation, which is another subsidiary of the Company's parent, Eastern Utilities Associates. Mr. St. Pierre sponsored the following three exhibits (5/14/82 Tr. pp. 3-19, 27): Montaup Electric Company decision in FERC Docket No. ER82-325-000 issued April 20, 1982 (Exh. BVE-1); prefiled testimony, supporting data, and proposed tariffs (Exh-BVE-2); and revised supporting data and proposed tariffs (Exh. BVE-3). The Division of Public Utilities and Carriers presented as its witness Joseph R. Pirraglia, Rate Analyst (5/14/82 Tr. pp. 20-25). No other testimony was offered in this proceeding.

According to Mr. St. Pierre, PPCA No. B-4 is entirely the result of the FERC's decision to suspend Montaup's M-7 Rate for only one day and to allow it to take effect subject to refund on April 21 (5/14/82 Tr. p. 7; Exh. BVE-1). Mr. St. Pierre also testified that the words "or billing demand" in subparagraphs 1a and 1b of the PPCA tariff should be eliminated, so that Blackstone Valley Electric would increase or decrease its rates only in the event of an increase or decrease in the wholesale rate under which it purchases its power supply from Montaup (Exh. BVE-2 p. 4). The company first proposed this change in Docket No. 1618 when the FERC changed Montaup's billing determinant from a 100% ratchet to an 80% ratchet effective November 5, 1981, but the Commission deferred its ruling in Order No. 10573. Mr. St. Pierre explained that the change in wording is designed to be consistent with Montaup's 80% billing ratchet and would eliminate any need for the Company to come before the Commission on a monthly basis for adjustments reflecting changes in billing demand (5/14/82 Tr. pp. 11-12). Lastly, Mr. St. Pierre had several changes of a minor nature involving the language appearing in most of the rate schedules (Exh. BVE-2 p.4).

Mr. Pirraglia testified that he had reviewed the methodology and numerical accuracy of Blackstone Valley Electric's filing and had found it to be proper and accurate in all respects (5/14/82 Tr. p. 22). On behalf of the Division, Mr. Crowell stated that the proposed tariff changes had been reviewed and were acceptable (5/14/82 Tr. p. 26). The Division took the position that PPCA No. B-4 and the resulting cumulative PPCA factor of $.02529 per kwh should be approved subject to refund for consumption of electricity on and after April 21, 1982.

Under existing federal law as interpreted by the United States Supreme Court, decisions of the FERC cannot be second-guessed by this Commission. Therefore, we must honor the FERC's decision to allow Montaup's M-7 supplemental rates. Under the circumstances of this proceeding, then, the Commission finds Blackstone Valley Electric's proposed PPCA No. B-4 in the amount of $.00124 per kwh, bringing the cumulative PPCA factor to the level of $.02529 per kwh, to be reasonable, supported by evidence, and in compliance with the Company's tariff. The new factor should be effective on future bills for consumption on and after April 21, 1982, subject to refund because the FERC has not yet issued a final decision on Montaup's M-7 supplemental rates. We further find that the Company's proposed new PPCA tariff R.I.P.U.C. #609 and its proposed minor language changes in various rate schedules are reasonable and supported by the record.

As we did last November, though, we feel compelled at this time to express our great displeasure with the FERC's decision to suspend Montaup's M-7 supplemental rate filing for only one day. As the FERC decision explains (Exh. BVE-1), Montaup filed its request on February 19, 1982, notice of the filing was issued by the FERC on February 26, and responses were due at the FERC on March 15. Despite this extremely tight timetable, the Attorneys General of Rhode Island and Massachusetts filed timely protests and petitions to intervene, requesting that the rates be suspended until hearings are held. In addition, Newport Electric Corporation and Pascoag Fire District filed timely protests and petitions to intervene, and the Coalition for Consumer Justice made a

similar filing on March 26. Moreover, the FERC trial staff filed timely comments recommending that the rates be suspended pending expedited hearings. Nevertheless the FERC chose to suspend the filing for only one day, reasoning in part "that Montaup has made a preliminary showing of severe financial stress in which capital cannot be raised at reasonable rates and that other regulatory relief would be less beneficial to the consumer."

Our reaction to this state of affairs is at least as strong as last November, when we said the following (Order No. 10573):

> While we have no authority under our federal system to undo the FERC's decision (*see Narragansett Electric v. Burke*, ___R.I.___, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978)), we do not hesitate to criticize Montaup and the FERC for the procedural predicament in which their actions have placed BVE and its customers. It is simply unreasonable to expect potential intervenors such as the Attorney General or the CCJ to intelligently analyze and comment on a complex Montaup rate filing in the space of three weeks, or to expect the State Commission to review the docket and decide on interim relief withing three days of the FERC's decision. Our sympathy for BVE's inability to recover certain revenues is greatly tempered, however, by the fact that BVE and Montaup are both wholly owned subsidiaries of Eastern Utilities Associates; that is, since EUA materminded the FERC filing and strenuously argued for the one-day suspension, it is only just that any loss in earnings resulting from the proceduaral lags inherent in a one-day suspension should be borne by EUA as BVE's sole stockholder. To some degree, at least, EUA is hoist with its own petard. But the real loser is the BVE ratepayer–who cannot pass along his costs to anyone else–in that he is denied a fair opportunity to be heard on the merits of a rate hike before being

> required to pay it. The Commission will continue to speak out about this unhappy situation at every opportunity.

Actually, Newport Electric Corporation and Pascoag Fire District are the innocent victims of the FERC's rush to judgment in that they protested the one-day suspension but ended up with some unrecoverable costs (*see* Newport Electric Docket No. 1643 and Pascoag Docket No. 1640). Blackstone Valley Electric, on the other hand, took no position in the FERC proceeding (*see* 5/14/82 Tr. p. 19) and yet bears no more burden than Newport Electric or Pascoag; if Blackstone Valley Electric were in this situation we might simply make this Report and Order effective for prospective consumption and allow the Company to suffer more of a loss at the hands of its own corporate family.

The magnitude of the burden borne by ratepayers as a result of the FERC's one-day suspension policy can be shown by cumulating the PPCA No. B-3 increase of $.00427 per kwh passed through last November in docket No. 1618 and the PPCA No. B-4 increase of $.00124 approved today, both of which flow from Montaup's M-7 rate filings. Taken together, these increases amount to $.00551 per kwh being charged to every Blackstone Valley Electric ratepayer without hearing or an adequate opportunity to be heard. This charge is equal to $2.20 every month on the bill of a typical residential customer using 400 kwh. Using the Company's most recent twelve-month sales figure of 1,137,554,014 kwh, the charge of $.00551 per kwh totals about $6,268,000 in additional annual revenues collected by Blackstone Valley Electric to be handed over to Montaup. By comparison, the general rate

increase we approved for Blackstone Valley Electric yesterday after nine months of hearings and deliberations was in the amount of only $3,236,278 in annual revenues, or about $1.40 for typical residential montly bills (Order No. 10695 in Docket No. 1605). Put another way, of a typical bill's total of about $35.90, only $1.40 or about four percent is due to yesterday's general rate increase by this Commission while $2.20 or about six percent is due to the Montaup increases awarded so offhandedly by the FERC. While it is true that the PPCA Nos. B-3 and B-4 rates are effective subject to refund, the fact remains that in these very difficult times our Rhode Island ratepayers must pay out of their pockets today while in Washington the burden has shifted to intervenors such as our Attorney General to persuade the FERC to undo what it has already done. In short, the actions of the FERC appear to us to be uncaring and flagrantly unfair to consumers.

Accordingly, it is

(10697) *ORDERED:* (1) That Blackstone Valley Electric Company's PPCA No. B-4 rate of $.00124 per kilowatthour, resulting in a cumulative PPCA factor of $.02529 per kwh, is hereby approved for future billings of electricity consumption on and after April 21, 1982, subject to possible refund, billing credit, or rate adjustment after final decision by the Federal Energy Regulatory Commission; and

(2) That Purchased Power Cost Adjustment tariff R.I.P.U.C. #609 filed by Blackstone Valley Electric Company on March 15, 1982, to supersede R.I.P.U.C. No. 582, and other tariff language changes filed by the Company are hereby approved.

DATED AND EFFECTIVE AT PROVIDENCE, RHODE ISLAND THIS TWENTY-FIRST DAY OF MAY, 1982.

PUBLIC UTILITIES COMMISSION

/s/ Edward F. Burke
Edward F. Burke, Chairman

/s/ Eleanor L. Miller
Eleanor L. Miller, Commissioner

/s/ Andrew L. Niven
Andrew L. Niven, Commissioner

(Seal)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS PUBLIC UTILITIES COMMISSION

IN RE: FILING BY	:	
BLACKSTONE VALLEY	:	DOCKET NO. 1618
ELECTRIC COMPANY.	:	
FILED ON OCTOBER 6, 1981.	:	

ORDER GRANTING COMPANY'S MOTION

On October 6, 1981, Blackstone Valley Electric Company filed proposed revised rate schedules and supporting testimony involving two adjustments under the Company's Purchased Power Cost Adjustment (PPCA) tariff. Rate schedules currently in effect under the PPCA, which became effective on October 1, 1981, are marked series B-1, and the proposed rate schedules are marked series B-2 and B-3.

According to the prefiled testimony of Dennis St. Pierre, Executive Assistant within the EUA Service Corporation, PPCA No. B-2 reflects the recent Montaup M-6 Rate Settlement Agreement before the Federal Energy Regulatory Commission. The net adjustment to base rate purchased power costs is a decrease of $.00005 per kilowatthour. Also according to Mr. St. Pierre, PPCA No. B-3 reflects the increased level of demand cost of purchased power to BVE resulting from Montaup Electric Company's M-7 Wholesale Rate filed at the FERC. PPCA No. B-3, which incorporates PPCA No. B-2, represents a net increase in base rate purchased power costs of $.00435 per kwh.

Both B-2 and B-3 were filed to become effective November 5, 1981. However, in its filing BVE explained that the B-3 request was based on the assumption that the FERC would suspend the M-7 filing for only one day,

allowing it to go into effect subject to refund on November 5. BVE made clear that if its assumption proved to be correct, then the B-2 request would not be necessary.

On October 28 the Commission issued Order No. 10552 suspending the effective date for the two-part filing for a period of five months beyond the proposed effective date of November 5. On November 13 BVE filed its Motion for Relief Under §39-3-12 of the General Laws, requesting that the commission permit its B-3 series of revised rate schedules to become effective forthwith, without hearing, subject to refund, pending completion of the Commission's investigation. In support of its Motion, BVE stated that the FERC had in fact suspended the M-7 filing for only one day, allowing it to become effective subject to refund on November 5, and submitted an affidavit by John F. G. Eichorn, Jr., Chairman of the Board, regarding BVE's financial condition. The FERC Order was issued November 3 in Docket No. ER81-749-000. On November 16 the Division of Public Utilities and Carriers stated in writing that it does not oppose the BVE Motion. On November 19 the Department of the Attorney General stated in writing, "In view of the contemplation of the public hearing and the fact that refunds would be available if subsequently determined to be justified, the Attorney General has no objection to the granting of the Company's Motion." The Commission has received no other responses to the Motion, which was communicated to parties of record in prior PPCA proceedings.

At 11:00 a.m. on November 30 the Commission held a limited hearing on BVE's Motion. For the Company Mr. St. Pierre presented his prefiled testimony and exhibits in

support of PPCA No. B-3 (Exh. B-1). Mr. St. Pierre also submitted an update to Exh. B-1, showing a net increase in base rate purchased power costs of $.00427 per kwh, or an increase in the amount of $1.71 for a typical residential customer using 400 kwh per month (Exh. B-2). For the Division Joseph R. Pirraglia, Rate Analyst, stated that the Company's calculations were accurate. The Company's filing also proposes certain changes in the wording and meaning of its tariff.

Section 39-3-12 of the General Laws, as amended, reads as follows:

> "At any such hearing involving any proposed increase in rate, toll or charge, the burden of proof to show that such increase is necessary in order to obtain a reasonable compensation for the service rendered shall be upon the public utility; provided, that the commission may, in its discretion and for good cause shown, allow changes within less time than required by the notice specified in § 39-3-11, and without holding the hearing and investigation therein provided for, or modify the requirements of § 39-3-11 with respect to filing and publishing tariffs either in the particualr instance or by general order applicable to special or particular circumstances or conditions, or may enter an interim order prescribing a temporary schedule or rates, tolls and charges pending the completing of its investigation."

Under the circumstances of this case, where BVE is being billed by its wholesale supplier Montaup in the wake of the FERC's one-day suspension, the Commission finds that good cause has been shown to allow the filing to take effect on an interim basis. For this reason, we will allow PPCA No. B-3 rates to become effective prospectively,

subject to refund, pending completion of the Commission's investigation. BVE's proposed non-rate changes in its tariff are not approved at this time.

Before closing, we take this opportunity to express our great displeasure with the FERC's decision to suspend the Montaup M-7 filing for only one day. As the FERC Order explains, Montaup filed its request on September 4, 1981, notice of the filing was issued by the FERC on September 15, and responses were due at the FERC on October 5. Despite this extremely tight timetable, the Attorneys General of the states of Rhode Island and Massachusetts individually filed protests and petitions to intervene, requesting a five-month suspension. In addition, the Coalition for consumer Justice filed a letter on October 2 seeking to participate in hearings and expressing concern as to the proposed rate increase. Nevertheless the FERC decided to suspend the filing for only one day, reasoning as follows:

> "[R]ate filings should generally be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust and unreasonable or that it may run afoul of other statutory standards. We have acknowledged, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results. Such circumstances have been presented here."

While we have no authority under our federal system to undo the FERC's decision (*see Narragansett Electric v. Burke*, ___R.I.___, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978)), we do not hesitate to criticize Montaup and the FERC for the procedural predicament in which

their actions have placed BVE and its customers. It is simply unreasonable to expect potential intervenors such as the Attorney General or the CCJ to intelligently analyze and comment on a complex Montaup rate filing in the space of three weeks, or to expect the State Commission to review the docket and decide on interim relief within three days of the FERC's decision. Our sympathy for BVE's inability to recover certain revenues is greatly tempered, however, by the fact that BVE and Montaup are both wholly owned subsidiaries of Eastern Utilities Associates; that is, since EUA materminded the FERC filing and strenuously argued for the one-day suspension, it is only just that any loss in earnings resulting from the procedural lags inherent in a one-day suspension should be borne by EUA as BVE's sole stockholder. To some degree, at least, EUA is hoist with its own petard. But the real loser is the BVE ratepayer–who cannot pass along his costs to anyone else–in that he is denied a fair opportunity to be heard on the merits of a rate hike before being required to pay it. The Commission will continue to speak out about this unhappy situation at every opportunity.

Accordingly, it is

(10573) *ORDERED:* That PPCA No. B-3 rate as filed by BVE on November 30, 1981, is hereby allowed to become effective for electricity consumed on and after November 30, 1981, subject to refund and pending full Commission investigation.

DATED AND EFFECTIVE AT PROVIDENCE, RHODE ISLAND THIS THIRTIETH DAY OF NOVEMBER, 1981.

PUBLIC UTILITIES COMMISSION

/s/ Edward F. Burke
Edward F. Burke, Chairman

/s/ Eleanor L. Miller
Eleanor L. Miller, Commissioner

/s/ Andrew L. Niven
Andrew L. Niven, Commissioner

(seal)

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-714

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
PETITIONER,

v.

BLACKSTONE VALLEY ELECTRIC COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

BRIEF FOR RESPONDENT IN OPPOSITION

PETER J. MCGINN
TILLINGHAST, COLLINS & GRAHAM
One Old Stone Square
Providence, Rhode Island 02903
(401) 456-1200
Counsel of Record

ROBERT G. BLEAKNEY, JR.
SULLIVAN & WORCESTER
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2903
Attorneys for Respondent Blackstone Valley Electric Company

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I.

QUESTION PRESENTED FOR REVIEW

Was the Rhode Island Supreme Court correct in holding that the doctrine of preemption under federal law did not apply to the ultimate distribution of a refund by a retail electric utility where the refund had been received by the retail utility from its wholesale power supplier pursuant to a Federal Energy Regulatory Commission rate adjustment?

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In the
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OCTOBER TERM, 1988

No. 88-714

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

PETITIONER,

v.

BLACKSTONE VALLEY ELECTRIC COMPANY,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

Respondent agrees with Petitioner's identification of the opinions and judgments delivered by the Rhode Island Supreme Court and the Rhode Island Public Utilities Commission.

Jurisdiction

Respondent agrees that Petitioner has correctly identified the federal statutory basis for the relief he seeks.

Constitutional Provisions, Statutes and Regulations

Respondent agrees with Petitioner that his argument relies upon Article VI of the United States Constitution as set forth in the Petition. Regulations or tariffs having the force of regulations under consideration include R.I.P.U.C. Tariff No. 745 (Appendix 32-33) and R.I.P.U.C. Tariff No. 709 (App. 34-36).

Statement of the Case

On August 24, 1987, Blackstone Valley Electric Company ("Blackstone" or "Company")[1] filed with the Rhode Island Public Utilities Commission ("Commission") for approval of an interim adjustment to its purchased power cost adjustment ("PPCA") factor to reflect billing adjustments received from its power supplier, Montaup Electric Company ("Montaup"). *See*, Opinion No. 267, *Montaup Electric Company*, Docket Numbers ER 81-749-003 and ER 82-325-002 (Phase 1), reported at 38 FERC (CCH) ¶61,252. A principal issue before the Commission was Blackstone's proposed disposition of a refund that the Federal Energy Regulatory Commission ("FERC") had determined that Montaup owed to its wholesale customers, including Blackstone.

Following hearings, the Commission ordered that Blackstone return to its ratepayers that portion of the Montaup refund created by them, but to hold that portion of the refund contributed by Blackstone in an escrow fund for future disposition by the Commission (App. 10, 26). On January 21, 1988, Blackstone filed with the Rhode Island Supreme Court a statutory petition for certiorari under §39-5-1, *Rhode Island General Laws*, 1956, as amended.

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[1] Blackstone is wholly owned by Eastern Utilities Associates, a Massachusetts trust whose stock is publicly traded. Its affiliates are Montaup Electric Company, Eastern Edison Company, EUA Service Corporation, EUA Cogenics Corporation, EUA Power Corporation and EUA Energy Investment Corporation.

In a decision and opinion dated June 27, 1988 and reported at 543 A.2d 253,[2] the Rhode Island Supreme Court, per Weisberger, J., sustained the Company's position and directed the Commission to permit payment of the refund to be made by Blackstone to its retail customers to the extent of their contributions in excess of the final rates and to Blackstone to the extent that it had underwritten payments to Montaup in excess of the FERC-approved rates. *Blackstone Valley Elec. Co.* v. *PUC*, 543 A.2d 253 (R.I. 1988).

The Attorney General then petitioned the Rhode Island Supreme Court for reargument, asserting that the doctrine of federal preemption required that all of the Montaup refund to Blackstone be paid by Blackstone to its retail customers. By an order dated July 25, 1988, the Court denied the petition for reargument and stated that the Attorney General's preemption argument "borders upon the frivolous, since the FERC merely ordered Montaup to refund excessive rates charged to its *wholesale* customers. There was nothing before the FERC which in any way dealt with the disposition of the refund by Blackstone, but only the question that a refund should be made to Blackstone by Montaup." (App. 7; emphasis in original).

By a petition for a writ of certiorari to this Court dated October 20, 1988, the Attorney General for the State of Rhode Island seeks review of the decision of the Rhode Island Supreme Court.

Summary of Argument

(i) The State of Rhode Island, and not the FERC, has jurisdiction to determine the ultimate disposition of a refund received by Blackstone, the retail electric distributing com-

[2] The syllabus of the case in the unofficial report contains the erroneous statement that "[t]he Superior Court, Providence County, Giannini, P.J., entered judgment and further review was sought" (App. 1; 543 A.2d 253). Under Rhode Island law §39-5-1, *R.I.G.L.*, 1956, as amended, appeals from decisions of the Commission are by way of non-discretionary statutory writ of certiorari to the Rhode Island Supreme Court. The superior court is not involved in the statutory appeal process and was not involved in this case.

pany, from Montaup, its wholesale distributor, where that disposition merely represents a retail price adjustment between Blackstone and its customers.

(ii) The Rhode Island Supreme Court correctly concluded that the FERC's determination of the amount of a refund by an interstate wholesale supplier to its wholesale purchaser does not control the State's determination of the ultimate distribution of that refund by the purchaser.

(iii) The federal court cases cited by Petitioner do not support application of federal preemption to the facts of this case.

(iv) Rhode Island's treatment of the ultimate disposition of the refund in this case is consistent with Rhode Island Commission regulations, State decisional law and Massachusetts' treatment of the same refund to Blackstone's affiliated company.

Argument

WHILE THE POWER TO SET RATES FOR INTERSTATE SALES OF ELECTRIC ENERGY AT WHOLESALE IS VESTED EXCLUSIVELY IN THE FERC, THE STATES MAY REGULATE THE SALE OF SUCH ENERGY AT LOCAL RETAIL RATES TO ULTIMATE CUSTOMERS. IN THE INSTANT CASE, THE FERC HAD EXCLUSIVE JURISDICTION TO DIRECT THE AMOUNT OF THE REFUND TO BLACKSTONE, THE LOCAL RETAIL ELECTRIC DISTRIBUTING COMPANY, BUT THE STATE OF RHODE ISLAND PROPERLY REGULATED THE DISPOSITION OF THAT REFUND BY BLACKSTONE TO ITS RETAIL CUSTOMERS.

In *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 214, 11 L.Ed.2d 638, 646 (1964), this Court, quoting from *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 86 L.Ed. 371 (1942), made it clear that Congress had adopted a test "which defined state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate customers.' " 376 U.S. at 214 (quoting

314 U.S. 498, 504). As to the wholesale rate, the price at which Montaup sells power to Blackstone in interstate commerce, there can be no question that the FERC has exclusive jurisdiction. *See, Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. at 498; *Eastern Edison Co.* v. *Dept. of Public Utilities*, 388 Mass. 292, 446 N.E.2d 684 (1983). That interstate price would of course include any refunds to the wholesale purchaser ordered by the FERC. The States, and not the FERC, regulate the price of energy between Blackstone, the local distributing company, and its retail customers in intrastate commerce.

The refund at issue here is a refund or price adjustment affecting the retail price of electricity between Blackstone and its customers and therefore beyond the jurisdiction of the FERC. While the Attorney General may term the issue "novel" (Petitioner's brief, hereinafter "brief," p. 20), we respectfully suggest that the reason for that assertion is that no one to date has had the temerity to suggest a concept so alien to the United States Constitution, the Federal Power Act,[3] the Natural Gas Act,[4] the decisions of this Court and inferior federal courts and the highest courts of the States.

(i) *Factual background:*

There is no dispute as to the facts underlying the instant case. Blackstone's purchased power cost adjustment filing of August 19, 1987 included a credit of $4,789,441.04, representing refunds with interest approved by FERC as a result of settlements reached on all outstanding issues in Montaup's M-7 through M-11 filings with the FERC.

During the period November 5, 1981 through December 31, 1986, Montaup sold power to Blackstone at interim rates approved by the FERC, subject to refund. In turn, Blackstone

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[3] 16 U.S.C. §§791(a) *et seq.*

[4] 15 U.S.C. §§717 *et seq.*

was allowed to reflect these costs in calculating the adjustment factor under its retail purchased power cost adjustment clause, R.I.P.U.C. tariff No. 709.[5]

Tariff No. 709 was superseded on January 1, 1987 by R.I.P.U.C. Tariff No. 745 (App. 32-33), a fully reconciling cost-of-service PPCA clause which allows an adjustment at least once every four months to match precisely what Blackstone has been billed for purchased power with the revenues it has received from its customers under the clause.

For the period covered by the refund, Blackstone offset the principal refund of $3,020,326.90 against its undercollection of M rates through 1986 and made allowance for an undercollection amount of $540,720.40 which the Commission had previously allowed Blackstone to recover (Exhibit BVE-6, Schedule H, p. 1 Revised; Supplemental Appendix 1). Blackstone's rates were not sufficient to pay Montaup's interim rates during the period prior to the final FERC decision on M rates. The Rhode Island Division of Public Utilities and Carriers[6] recognized this fact. Blackstone's customers never paid to Blackstone the principal amount of $1,866,340.37 which Blackstone paid to Montaup during the relevant period.

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[5] There had been a progression of tariffs leading to R.I.P.U.C. Tariff No. 709, beginning with R.I.P.U.C. Tariff No. 568, but the pertinent language has remained unchanged. Recovery of purchased power costs under this tariff was accomplished by means of a kilowatt-hour charge based upon the operating results of twelve months immediately preceding a change in purchased power costs. It had no language allowing the reconciliation of costs and revenues except the following:

> "The amount of such adjustment [to reflect refunds from wholesale suppliers] by the Company shall not be geater than any applicable excess amount collected by the Company from its customers" (App. 35).

[6] Under Rhode Island statutory and case law the Division invariably assumes an adversary position against utilities on filings before the Commission. *R.I. Gen. Laws* §39-1-11 (1956), as amended; *Narragansett Electric Company* v. *Harsch*, 117 R.I. 395, 368 A.2d 1194 (1977).

Prior to determination that a refund was due, the Commission denied Blackstone's application to recover the amount of its undercollection during most of the period covered by the M rates. Blackstone had sought to recover $2,407,060.77 of the undercollection as a transition charge when it implemented R.I.P.U.C. Tariff No. 745, which replaced R.I.P.U.C. Tariff No. 709.

(ii) *The Rhode Island Supreme Court's reasoning:*

In denying the Attorney General's petition for reargument, the Rhode Island Supreme Court concluded (App. 8-9):

> "Rhode Island had recognized federal preemption far earlier in *Narragansett Electric Company* v. *Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978). Neither the so-called 'Narragansett doctrine' nor the recent preemption decision by the United States Supreme Court in Mississippi Power & Light Co., supra, has the slightest impact upon the determination which the Public Utilities Commission of Rhode Island made upon the disposition of the subject refund. The FERC simply did not make any determination beyond that of requiring Montaup to refund a sum of money to Blackstone and its other wholesale customers. The disposition of those refunds was left as it must be to the individual state regulatory agency."

A brief analysis compels the conclusion that the Rhode Island Supreme Court correctly rejected the Attorney General's preemption argument. Furthermore, under Blackstone's intrastate tariffs and Rhode Island case law, the Rhode Island Supreme Court had no choice but to reject the Attorney General's argument that, upon refund by Montaup, Blackstone's ratepayers should not receive funds greater than the amounts they paid to Blackstone in the form of rates.[7]

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[7] In *Roberts* v. *Narragansett Electric Company*, 470 A.2d 215 (R.I. 1984), the Court confronted a tariff virtually identical to Blackstone's Tariff No. 709 (App. 34-36); *See*, 470 A.2d 216-217. The Court concluded that to the

The Attorney General argues that the Rhode Island Supreme Court's decision conflicts with this Court's decisions in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. __. 101 L.Ed.2d 322 (1988) and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 90 L.Ed.2d 943 (1986). Neither case supports the Petitioner's argument. In the *Mississippi Power & Light Company* case, this Court held that the Mississippi Supreme Court could not permit a collateral attack on the reasonableness of a FERC-approved rate which permitted the power company to recover its costs of investment in a nuclear plant. The Court stated, 487 U.S. at __, 101 L.Ed.2d at 339, that "[w]hen FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate." The Rhode Island Supreme Court had already recognized the rationale of the *Mississippi Power & Light Co.* case in *Narragansett Electric Co.* v. *Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978).

The Rhode Island Supreme Court recognized that the fundamental issue presented by the Mississippi case was the inability of the state court to question the prudence of a FERC decision permitting recovery by the retail entity of a power company expense. The Court stated (App. 8):

> "It was this determination by the Mississippi Supreme Court which the Supreme Court of the United States held in an opinion by Justice Stevens to be in violation of the

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extent that Narragansett Electric did not collect sufficient funds from its customers to pay its power supplier, "equity and common sense" required that Narragansett's under-recoveries be offset against a refund received from its power supplier. To impose a refund obligation on Narragansett where the retail utility's customers had not paid sufficient funds to pay Narragansett's power bills "would border upon the unconscionable." *Roberts* v. *Narragansett Electric Co.*, supra, 470 A.2d at 217. The Attorney General continues to ignore this case.

Federal Supremacy Clause, since Congress had given FERC plenary authority in this area and therefore the FERC decision could not be second-guessed by a state court or regulatory agency."

(iii) *Response to Petitioner's preemption argument:*

In *Nantahala Power & Light Company*, the FERC, in setting wholesale power rates, allocated certain low cost and high cost power to the Nantahala Power & Light Company ("Nantahala") and to its affiliate. Nantahala owned a hydroelectric power plant and sold most of its power output to the Tennessee Valley Authority. The wholesale power rates were based on the FERC allocation. In addition, Nantahala purchased certain high cost power from the Tennessee Valley authority to serve its wholesale and retail customers. The North Carolina Utilities Commission adopted a different allocation than FERC and, in rejecting federal preemption arguments, effectively held that Nantahala could not fully recover the amount of its power bills from its customers. 476 U.S. at 960-961. The North Carolina Supreme Court affirmed the regulatory agency's decision. This Court, in a unanimous decision, held that the State of North Carolina was preempted from changing the FERC-approved allocation and denying Nantahala the right to recover fully its power costs. The Court, per O'Connor, J., stated:

"When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.* * *Here, Nantahala cannot fully recover its costs of purchasing at the FERC-approved rate if NCUC's order is allowed to stand." 476 U.S. 953 at 970, 90 L.Ed.2d 943, 956.[8]

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[8] This Court in *Nantahala Power & Light Company* v. *Thornburg*, 476 U.S. at 965, cited with approval the Rhode Island Supreme Court's decision in *Narragansett Electric Co.* v. *Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972, 56 L.Ed.2d 63 (1978). In the *Narragansett Elec-*

Neither the *Mississippi Power & Light Company* nor the *Nantahala Power Company* cases involved a refund. Unlike the present case, however, the States' action in both cases interfered with the amount of a FERC-approved wholesale power rate. In the instant case, the Rhode Island Supreme Court's decision on Blackstone's disposition of the Montaup refunds affects only the retail price of electricity between Blackstone and its customers and, as this Court stated in *Nantahala*, deals only with the State's undoubted jurisdiction over retail sales. 476 U.S. at 970. If the State's action is not at variance with a FERC-approved rate, as was the situation in *Narragansett Electric Company* v. *Burke*, 119 R.I. 559, 381 A.2d 1358, FERC's interest in the transaction between a wholesaler-as-seller and its retail customers in intrastate commerce terminates once the FERC-directed refund has been made. The case at bar involves the ultimate disposition of a refund, only a portion of which was collected from ratepayers.

The cases cited by the Attorney General (brief, p. 16 n.9) for the proposition that utilities cannot recover certain losses not only have nothing to do with federal preemption but do not support his proposed disposition of the refund in the case at bar. *Boston Edison Co.* v. *FERC*, 611 F.2d 8 (1st Cir. 1979), and *Public Service Co. of New Hampshire* v. *FERC*, 600 F2d 944 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 990 (1979) are representative of his citations. In each of these

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tric Company case, the Commission, in an approach similar to the state's action in *Mississippi Light & Power Co.* v. *Mississippi ex rel. Moore*, 487 U.S. __, 101 L.Ed.2d 322, questioned the prudence of costs underlying the FERC-approved rates and prevented Narragansett from passing on to its retail customers a portion of those costs. The Rhode Island Supreme Court reversed the Commission, stating that the FERC-approved rate must be treated as a reasonable operating expense to Narragansett. 119 R.I. 559, 568-569. Of interest, the Court observed that the increased costs to Narragansett may or may not affect Narragansett's retail rate, depending upon whether Narragansett realized savings in other areas. *See*, *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. at 968.

cases, the Court of Appeals held that a utility, subject to FERC regulation, could not recover under a new, cost-of-service tariff a cost under-recovery incurred under a superseded, fixed-rate tariff. These cases are not refund cases and, unlike the instant case, involve principles of retroactive ratemaking (see App. 3-4), which a state would nevertheless be free to accept or reject without regard to preemption.

(iv) *Response to Petitioner's offset argument:*

The Attorney General also argues that federal law is hostile to attempts by utilities to utilize refunds to set off losses (brief, pp. 17-20). Assuming, *arguendo*, that this federal hostility has some relevancy to actions by the States, the cases cited by the Attorney General do not support his shaky proposition. In *Belco Petroleum Corp.* v. *FERC*, 589 F.2d 680 (D.C. Cir. 1978) (brief, p. 18), an interstate seller of natural gas sought to offset a refund relative to excessive rates it had collected against income the utility never received during a five-month suspension period when the filed tariff was *not* in effect. The court was clearly correct in rejecting an attempt to make rates retroactive to cover a suspension period when the new rates were not in effect.

In *Gillring Oil Co.* v. *FERC*, 566 F.2d 1323 (5th Cir. 1978), *cert. denied*, 439 U.S. 823 (brief, p. 18), an independent gas producer sought to offset refunds, accumulated by excessive prices during an eight-year period, by the amount it charged below the allowable ceiling before and after the eight-year period. The court pointed out that the prices before and after the eight-year period were bargained for and were therefore fixed. Contract or tariff also appears to be the basis for the court's *per curiam* opinion in *Natural Gas Pipeline of America* v. *Federal Power Commission*, 134 F.2d 263, 265 (7th Cir. 1942) (brief, pp. 17-18). That case was recently distinguished in *Okaloosa Asphalt Enterprises* v. *Okaloosa County Gas*

District, 524 So.2d 1095 (Fla. App. 1 Dist. 1988), where the court observed that the FERC, as in the instant case, imposed no restrictions on the refund to be paid to the wholesale purchaser.

In *Interstate Natural Gas Ass'n of America* v. *FERC*, 756 F.2d 166 (D.C. Cir. 1985) (brief, p. 18), the court directed the FERC to implement refund procedures pursuant to an earlier decision that the FERC had improperly calculated natural gas wellhead prices. The FERC reversed an earlier order that producers making refunds could not offset moneys owed them by pipelines. The court, in directing the FERC to reinstate its earlier order, held that the FERC had not articulated reasons for its change of position and that the refund issue should not become entangled with disparate issues on appeal on another issue. 756 F.2d at 171-172.

United Gas Pipe Line Co. v. *FERC*, 657 F.2d 790 (5th Cir. 1981) (brief, p. 18), simply involved a FERC determination of how interest would be calculated when regulated companies were required to make refunds.

The FERC order at issue here directed Montaup to "refund all amounts collected in excess of the approved rates..." Opinion No. 267, *Montaup Electric Co.*, supra, 38 FERC (CCH) ¶61,252, at 61,866. Montaup had collected amounts from its customer, Blackstone. Contrary to the Attorney General's assertion (brief, p. 7), the FERC order did not address Blackstone's refund obligations to its customers. Blackstone's relationship with its customers affects the intrastate retail price between them and does not in this case affect in any way the wholesale interstate price between Montaup and Blackstone. Even if the FERC were authorized to order Blackstone to refund moneys to its retail customers, it would be hard-pressed to direct a "refund" of moneys never paid to Blackstone by its retail customers.[9]

[9] To refund is "to return (money) in restitution, repayment or balancing of accounts." *Webster's Third New International Dictionary* (G. & C. Merriam Co. 1961).

The Attorney General's reliance upon *Eastern Edison Co.* v. *Department of Public Utilities*, 388 Mass. 292, 446 N.E.2d 684 (1983) (brief, p. 19 n.10), presumably in support of his preemption argument, is puzzling.[10] As did *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. __, 101 L.Ed.2d 371, and *Narragansett Electric Company* v. *Burke*, 119 R.I. 559, 381 A.2d 1358, the *Eastern Edison* case involved a regulatory agency's attempt to prevent a retail utility from passing on part of the cost of a FERC-approved wholesale power rate. 388 Mass. 292, 446 N.E.2d 684. Relying on the Court's decision in *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 11 L.Ed.2d 638 (1964), the Massachusetts Supreme Judicial Court concluded "that the department's actions interfered with the FERC's exclusive jurisdiction to set rates for electricity transmitted and sold at wholesale in interstate commerce." 388 Mass. at 297, 446 N.E.2d at 687-688. The *Eastern Edison Company* case has nothing to do with the ultimate disposition of a FERC-directed refund by a retail utility in intrastate commerce.

(v) *Massachusetts treatment of the refund:*

When the same refund here at issue was made by Montaup to Eastern Edison Company, Blackstone's Massachusetts retail affiliate, the Massachusetts Department of Public Utilities had no hesitation in ordering a refund by Eastern Edison to its customers "to the extent previously collected from them. . ." *In re Eastern Edison Co.*, D.P.U. 87-29/87-53; April 3, 1987, p. 6; and subsequent approval in D.P.U. 87-186; September 28, 1987 (Supp. App. 2 *et seq.*).

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[10] Eastern Edison's attorneys in the cited case are Boston counsel for Respondent in the instant case.

Conclusion

The Rhode Island Supreme Court correctly concluded that Petitioner's federal preemption argument "borders upon the frivolous." (App. 7). The Petitioner has not and cannot demonstrate why this Court should exercise its discretion and extraordinary power to issue a writ of certiorari. Rule 17, *Rules of the Supreme Court of the United States*. For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER J. MCGINN
TILLINGHAST, COLLINS & GRAHAM
One Old Stone Square
Providence, Rhode Island 02903
(401) 456-1200
Counsel of Record

ROBERT G. BLEAKNEY, JR.
SULLIVAN & WORCESTER
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2903
Attorneys for Respondent
Blackstone Valley Electric Company

Supplemental Appendix 1

SCHEDULE H
1 OF 7
REVISED
8/28/87

CALCULATION OF NET REFUND

LINE 1	PRINCIPAL AMOUNT OF M-7, M-8, M-9 SETTLEMENT CREDIT.	$3,020,326.90
LINE 2	UNDERCOLLECTION OF M RATES THROUGH 1986.....	($2,407,060.77)
LINE 3	LESS ALLOWANCE FOR M-10 SETTLEMENT UNDERRECOVERY.....	$ 540,720.40
LINE 4	NET PRINCIPAL REFUND.....	$1,153,986.53
LINE 5	NET PRINCIPAL REFUND / PRINCIPAL REFUND = 1,153,986.53 / 3,020,326.90 =	0.38207
LINE 6	INTEREST REFUND.....	$1,769,114.14 0.38207
LINE 7	NET INTEREST REFUND.....	$ 675,925.44
LINE 8	AMOUNT PROPOSED TO BE REFUNDED... (LINE 4 + LINE 7)	$1,829,911.97
LINE 9	AMOUNT PROPOSED TO BE REFUNDED.... PER MONTH OVER 16 MONTH PERIOD (LINE 8 / 16)	$ 114,369.50
LINE 10	AMOUNT PROPOSED TO BE REFUNDED... IN SEPTEMBER AND OCTOBER 1987 (LINE 9 + 2)	$ 228,739.00

THE COMMONWEALTH OF MASSACHUSETTS

[SEAL] DEPARTMENT OF PUBLIC UTILITIES

April 3, 1987

D.P.U. 87-29/87-53

Investigation by the Department on the application of Eastern Edison Company for approval of an interim decrease in its Purchased Power Cost Adjustment factor, for three months, April 1, 1987 through June 30, 1987, to reflect settlement refunds received by Eastern Edison Company from its wholesale supplier as filed with the Federal Energy Regulatory Commission and a decrease in its Purchased Power Cost Adjustment, designated E-8.

APPEARANCES: DAVID FAZZONE, ESQ.
SULLIVAN & WORCESTER
One Post Office Square
Boston, Massachusetts 02109
FOR: EASTERN EDISON COMPANY
Petitioner

On February 9, 1987, Eastern Edison Company ("Company" or "EECo") petitioned the Department of Public Utilities ("Department") for a decrease in its purchased power cost adjustment ("PPCA"). The decrease is designated PPCA rate E-8 and is based on a decrease in EECo's demand costs under its wholesale tariff (M-11) from Montaup Electric Company ("Montaup"). The Federal Energy Regulatory Commission ("FERC") approved the change in Montaup's demand charge upon which the PPCA adjustment is based on January 1, 1987. EECo's filing was docketed as D.P.U. 86-29.

On March 4, 1987, the Company petitioned the Department for further changes in its PPCA rate which would reflect a refund to EECo from Montaup which was authorized and

approved by the FERC on January 30, 1987. The refund reflects the terms of a settlement agreement between Montaup, the Department of the Attorney General for the Commonwealth of Massachusetts, and the staff of FERC for costs during the period June 6, 1985, through December 31, 1986. The refund would reduce the proposed PPCA designated E-8 (M-11), and was filed pursuant to EECo's PPCA clause, M.D.P.U. No. 116. This request was docketed as D.P.U. 86-53.

EECo is a wholly-owned subsidiary of Eastern Utilities Associates ("EUA"), a utility holding company. EUA's other subsidiaries, affiliates of EECo, include Blackstone Valley Electric Company ("Blackstone") in Rhode Island, and EUA Service Corporation, which provides engineering, technical and other services for the EUA companies. Montaup is a wholly-owned subsidiary of EECo and supplies power to EECo, Blackstone, and certain municipal electric utilities. EECo purchases all of its power requirements at wholesale from Montaup pursuant to rates regulated by the FERC. Thus, EECo does not own or operate any units of its own to serve the approximately 154,629 customers in its service territory, which includes over 20 cities and towns in southeastern Massachusetts.

A public hearing to consider the Company's petitions was held on March 20, 1987, in the Department's offices. The Department directed the Company to give notice of the hearing by publication in the Fall River Herald News, the Quincy Patriot Ledger, the Brockton Enterprise, and the Boston Herald. The Attorney General of the Commonwealth ("Attorney General") was notified of this proceeding but did not seek to intervene.

At the hearing, the Company presented two witnesses, Dennis St. Pierre, director of rates for EUA Service Corporation, and Albert W. Newton, senior rate analyst for EUA. The Company offered five exhibits in support of the proposed changes

to its PPCA rate: Exhibit EE-1, the testimony and schedules of Mr. Newton; Exhibit EE-2, revised schedules of Exhibit EE-1; Exhibit EE-3, entitled "Eastern Edison Company Refund Plan"; Exhibit EE-4, revised schedules and pages of Exhibit EE-3, and Exhibit EE-5, revised page 90 of Exhibit EE-3.

The PPCA clause is designed to recover Montaup's demand-related charges to EECo. Under the terms of the Company's PPCA clause, M.D.P.U. No. 116, whenever there is a change in Montaup's demand rate, EECo is required to file for a revision to its PPCA factor with the Department.

Mr. Newton testified that the proposed decrease from the current PPCA (E-7) of $0.02215 per kilowatthour ("KWH") to $0.02167 resulted from a change in Montaup's demand charge to its wholesale customers from $20.12 to $20.06. The FERC approved the reduction in the demand charge by letter order on January 30, 1987. The company requests that the Department approve the required change in the PPCA to be effective immediately and without proration (Exh. EE-1, p. 2). The calculation of the adjustment of -$0.00049 is shown on Table 1 attached to this Order. This factor differs slightly from the Company's proposed adjustment of -$0.00048 because of the Department's policy to truncate the final significant digit of the factor.

Mr. St. Pierre testified that EECo proposes to refund $3,339,295.25 to retail customers through a three-month reduction of -$0.00625 to the proposed E-8 PPCA factor (Exh. EE-4, p. 96). The company's witness indicated that the proposed PPCA refund is composed of three parts: (a) $487,647.23, representing the M-10 and M-11 settlement refund and interest accrued thereon; (b) a $1,055,468.19 purchased capacity adjustment clause ("PCAC") reconciliation refund and interest received from Montaup (Tr. 16-17); and (c) $1,746,293.71, representing a reconciliation of EECo's PPCA expenses and revenues for the period March 1986 through December 1987.

The portion of the refund related to the settlement of rates M-10 and M-11 applies to costs collected by Montaup from EECo during the period June 6, 1985, through December 31, 1986.[1] Also approved by the FERC is a reconciliation of expenses and revenues under Montaup's PCAC.[2] The PCAC for Montaup became effective March 1, 1986, although it was approved retroactive to June 6, 1985, by the FERC. Under the terms of the PCAC, Montaup has prepared a reconciliation for the period March 1, 1986, through December 31, 1986, and has determined that EECo is entitled to a refund in the amount of $1,055,468.19 plus interest.

The third component of the refund is a reconciliation proposed by EECo of its expenses from Montaup and its revenues from the PPCA in effect from March 1, 1986, through December 31, 1986 (Exh. EE-5). Mr. St. Pierre testified that if the Company had not filed for the refund approved by the FERC, it would not have requested this reconciliation under the terms of its current PPCA tariff.

Under the terms of EECo's PPCA tariff, M.D.P.U. No. 116, the Company is required to file a plan to refund to its retail customers any amounts received from its wholesale supplier. EECo's refund plan (Exh. EE-3) proposes to return the $3,339,295.25 through a credit to its proposed E-8 factor during the months April, May and June 1987.

---

[1] The settlement allowed Montaup to recover from its wholesale customers 82 percent of its investment loss in Seabrook 2 over a period of 7½ years (Tr. 13). A partial settlement on the M-10 rate was approved by the FERC and was the subject of a refund which flowed through the PPCA in August 1986. EECo calculates an adjustment to its refund amount in this proceeding to account for reconciliation of its refund in August (Exh. EE-3, Sch. 6).

[2] The PCAC splits Montaup's traditional "M" rate into a base demand rate component and a purchased capacity component. In addition, the PCAC calls for an annual reconciliation of the revenues and expenses incurred by Montaup. While the first PCAC reconciliation occurred on February 28, 1986, this and all future PCAC reconciliations will be on a calendar year basis and should be reflected in the January billings from Montaup to EECo (Tr. 21-24).

FINDINGS

1. Given the information before the Department, the Department finds that the Company's purchased power cost adjustment factor E-7 (M-11) should be decreased by $0.00049/KWH to be effective for bills rendered beginning in the month of April 1987.

2. The Department finds that the company's refund plan requires further investigation. The Company should file revised schedules which calculate the appropriate refund amount including interest and its effect on the E-8 PPCA factor based on a proposed refund period of May, June and July 1987.

ORDER

Accordingly, after due notice, public hearing and consideration, it is

ORDERED: That Eastern Edison Company's purchased power cost adjustment factor No. E-7 (M-11) is hereby revised for all Eastern Edison Company filed rates, and is permitted to become effective with respect to bills rendered beginning in the month of April 1987, and shall be applied as a uniform charge to each KWH sold on the applicable rates which are subject to the Company's PPCA provisions; and it is

FURTHER ORDERED: That the rate provided for in Eastern Edison Company's purchased power cost adjustment factor No. E-8 shall be reduced promptly, following a reduction in Montaup Electric Company's proposed M-11 rate or such other Montaup Electric Company rate for primary service at wholesale as shall become effective in lieu thereof, as a result of proceedings before the Federal Energy Regulatory Commission; and it is

FURTHER ORDERED: That any refund paid or credited to Eastern Edison Company by Montaup Electric Company as a result of the aforesaid proceedings shall be promptly and

fully flowed through by Eastern Edison Company to its customers to the extent previously collected from them as the result of a price change provided for in purchased power cost adjustment factor No. E-8, in such manner as shall be approved by the Department.

A true copy
Attest;
/s/ MARY L. COTTRELL
MARY L. COTTRELL
Secretary

[SEAL]

By Order of the Department
/s/ ROBERT J. KEEGAN
Robert J. Keegan, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

TABLE 1
EASTERN EDISON COMPANY PPCA D.P.U. 87-29

E-8 (M-11) Rates
Per KW Demand:
$20.05739

Month		Actual KW Demand	Billing KW Demand	E-B Base Demand Charges	KWH Sales to Final Customers
April	1986	342,100	346,960	$6,959,112	175,775,368
May	1986	364,500	364,500	$7,310,919	169,516,963
June	1986	377,400	377,400	$7,569,659	172,563,653
July	1986	403,300	403,300	$8,089,145	172,294,133
August	1986	394,900	394,900	$7,920,663	189,244,620
September	1986	361,400	361,400	$7,248,741	178,813,513
October	1986	368,200	368,200	$7,385,131	175,219,010
November	1986	386,500	386,500	$7,752,181	176,833,567
December	1986	402,900	402,900	$8,081,122	198,225,063
January	1987	401,300	401,300	$8,049,031	208,513,897
February	1987	395,600	395,600	$7,934,703	204,790,229
March	1987	397,900	397,900	$7,980,835	201,236,000
TOTALS		4,596,000	4,600,860	$92,281,243	2,223,026,016

	E-8 (M-11) Rates
PPCA PER KWH	$.041512
PPCA IN BASE RATES	$.019843
NEW PPCA	$ .02166
PREVIOUS PPCA E-7 (M-11)	$ .02215
PPCA INCREASE	$-.00049

EASTERN EDISON COMPANY

CALCULATION OF NEGATIVE SURCHARGE
DPU 87-186

LINE 1	ADJUSTED REFUND AMOUNT	$8,259,014.60
LINE 2	INTEREST (SCHEDULE 6)	273,630.05
LINE 3	PPCA UNDERCOLLECTION (SCHEDULE O)	-1,138,421.56
LINE 4	NET REFUND AMOUNT	$7,394,223.09
LINE 5	KWH SALES REFUND PERIOD OCTOBER 1987 - MARCH 1988	1,182,428,000
LINE 6	NEGATIVE SURCHARGE OCTOBER 1987 - MARCH 1988 / KWH	$ 0.00625

APPROVED

9/28/87

/s/ BERNICE K. MCINTYRE

/s/ ROBERT J. KEEGAN

COMMISSIONERS, D.P.U.

SUPREME COURT, U.S.
FILED
NOV 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-714

In The

Supreme Court of the United States

October Term, 1988

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

v.

BLACKSTONE VALLEY ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

REPLY BRIEF

SHELDON WHITEHOUSE
Special Assistant Attorney General
Department of Attorney General
72 Pine Street
Providence, R.I. 02903
(401) 274-4400

Counsel of Record
Attorney for Petitioner
JAMES E. O'NEIL
Attorney General
State of Rhode Island and
Providence Plantations

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. Blackstone Valley Electric's claim that its customers did not pay Montaup's FERC overcharge is belied by the undisputed underlying facts.

Blackstone Valley Electric Company has peppered its brief with the claim that "only a portion of [the refund] was collected from ratepayers." Blackstone Valley Electric Brief in Opposition (hereinafter "BVE brief") at p. 10; see also, pp. 6, 12. This claim muddies the issues, and the undisputed facts prove that it is not correct.

As the Attorney General's Statement of the Case relates, during the period of Montaup Electric's FERC overcharges, Blackstone Valley Electric was experiencing (at least on a net basis) local undercollections that resulted from the operation of its state-level Purchased Power Cost Adjustment clause ("PPCA clause"). Attorney General's brief ("AG brief"), pp. 2-4, 10. The question how the FERC overcharge and the state-level undercollection are related is resolved by BVE's own witnesses.

The company's testimony showed that the local PPCA miscalculations and the resulting state-jurisdictional losses would have happened *with or without* the FERC overcharge:

> Q: . . . If during the period November 5th of 1981 to December 31 of 1986, the M-7 related rates . . . had been guessed just right by Montaup so there was no refund requirement, would there still have been a PPCA undercollection during that period?
>
> THE WITNESS: Yes.

PUC Docket No. 1856, Tr. 9/3/87 p. 51. When the same issue was raised in a prior proceeding involving a $540,000 undercollection, the BVE witness' testimony was the same:

Q: Supposing that Montaup's interim rate had been exactly correct?

THE WITNESS: Then there would have been no need for a refund from Montaup.

Q: And then the amount of 540,000 then would never have been recovered.

THE WITNESS: That is right. It would have been a loss to Blackstone.

PUC Docket No. 1792, Tr. 5/28/86 p. 36. The PPCA undercollections were not only not caused by the FERC overcharge, they were actually (as well as jurisdictionally) independent. In fact, even the Rhode Island court concluded that the PPCA clause undercollections would have occurred and, but for the FERC refund, "would probably have been lost to the Company for all time." *Blackstone Valley Electric Co. v. P.U.C., supra,* 543 A.2d at 255.

BVE's testimony and the decision below prove that BVE collected the Montaup FERC overcharge from its customers on top of a base of independent local undercollections. These undisputed facts contradict the company's argumentative conclusion that "only a portion of [the refund] was collected from ratepayers," *supra.* The superficial appeal of the company's argument that it didn't collect the overcharge because of the undercollection, and therefore should not have to refund the overcharge, is consequently destroyed.

II. Blackstone Valley Electric's argument unfairly shifts the "bright line" required by this Court to separate state from federal utility regulation depending on whether federal charges or federal credits are at stake.

Blackstone Valley Electric's argument in opposition demonstrates the one-sided approach to federal preemption criticized by the Attorney General. AG brief pp. 14-17, 23-24. This Court has required a "bright line" to be drawn between federal and state regulation. *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205, 215-216 (1964). Blackstone Valley Electric draws the bright line between federal and state jurisdiction where the "price adjustment affect[s] the retail price of electricity between Blackstone and its customers and [is] therefore beyond the jurisdiction of the FERC." BVE brief, p. 5.

At the same time, however, BVE cites the case of *Eastern Edison Co. v. Department of Public Utilities*, 388 Mass 292, 446 N.E.2d 684 (1983), as holding that "a regulatory agency's attempt to prevent a retail utility from passing on part of the cost of a FERC-approved wholesale power rate . . . 'interfered with the FERC's exclusive jurisdiction to set rates for electricity transmitted and sold at wholesale in interstate commerce.'"[1] BVE brief at p. 13, quoting *Eastern Edison*, 388 Mass at 297, 446 N.E.2d at 687-688. BVE further admits that,

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[1] The Attorney General's argument in this case can be summarized effectively by replacing the word "cost" with the word "refund" or "credit" in this quotation excerpted from the Company's brief. The arguments are parallel.

> As to the wholesale rate, the price at which Montaup sells power to Blackstone in interstate commerce, there can be no question that the FERC has exclusive jurisdiction. That interstate price would of course include any refunds to the wholesale purchaser ordered by the FERC.

BVE brief, p. 5. The company cannot have it both ways.

Blackstone Valley Electric does not explain why a FERC-approved credit may be interfered with at will by state officials, when a FERC-approved charge must be assessed against ratepayers so as not to interfere with federal jurisdiction. Surely, this court's "bright line" separating state from federal jurisdiction does not shift depending on whether federal charges or federal credits are at issue. This important federal question does not " 'border[] upon the frivolous.' " BVE brief, pp. 3, 14.

In this case, its affiliate's FERC overcharges have put BVE in a better position than it would have been in but for the FERC overcharges. BVE's proposal to use the excessive and illegal overcharges by its FERC-regulated affiliate to compensate for state-jurisdictional losses attributable to defects in local rates amounts to federal relief for the state-regulated utility. The Attorney General submits that the refund offset crosses the "bright line" between federal and state regulation, and that *Eastern*

Edison has correctly stated the level of deference due federal rate and refund determinations.

Respectfully submitted,

SHELDON WHITEHOUSE
Special Assistant Attorney General
Department of Attorney General
72 Pine Street
Providence, R.I. 02903
(401) 274-4400

Counsel of Record
Attorney for Petitioner
JAMES E. O'NEIL
Attorney General
State of Rhode Island and
Providence Plantations